No. 3198

IN

The United States Circuit Court of Appeals

For the Ninth Circuit

THE CITY OF SALEM, a municipal corporation, WALTER E. KEYES, its Mayor, and C. O. RICE, its Treasurer,

Plaintiffs in Error,

vs.

SALEM WATER, LIGHT & POWER COMPANY, a corporation,

Defendant in Error.

Brief of Plaintiff

Upon Writ of Error to the District Court of the United States for the District of Oregon

N. D. ELLIOTT, PRINTER, SALEM, ORE.

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NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD

Wood, Montague, Hunt & Cookingham, Yeon Building. Portland, Oregon, for the Defendant in Error.

B. W. Macy, Salem, Oregon,
Wm. P. Lord, Lewis Bldg., Portland, Oregon,
for the Plaintiffs in Error.

STATEMENT OF FACTS

The city of Salem was incorporated and granted a charter by an act of the Legislative Assembly of the State of Oregon, in the year 1862, approved October 21, 1862, and pursuant to Section II of Article XI of the Constitution of Oregon, approved by Congress in 1859.

The Constitutional provision was as follows:

> "Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended. or repealed, but not so as to impair or destroy any vested corporate rights."

This act, and the subsequent amendatory acts of 1887, are not material to any issue in this case. It may be noted, however, that under the terms of the Charter granted the City of Salem, until the year 1889, the powers of the Common Council were so circumscribed that the city was powerless to grant an advantageous franchise to any water company furnishing the city and its inhabitants with water. The powers granted were "To provide the city with good, wholesome water" (Laws 1887, page 256). It was at the next session of the Legislature that the Charter was amended enlarging the powers of the Common Council so that the city had power to grant an advantageous franchise to a water company to supply the city and its inhabitants with water, and at the same time granting the right to in-

stall a municipal water works, and to fix water rates and tolls.

It may be further noted that denfendent in error's predecessors had in no sense an exclusive franchise. Under the Charter powers granted, the Common Council had the power to either construct its own water works, or purchase any existing private water plant engaged in supplying the city and its inhabitants with water under any franchise granted by the Common Council. It will be seen that under the terms of the franchise contract with the city, the power of municipal ownership was expressly provided for, hence no question of the validity of the franchise is involved in this action.

The act of 1899, amending the original and supplementary acts, (Special Laws 1889, et seq.) and the amendatory act of 1891 (Special Laws 1891, page 1088), are important as the rights of the respective parties to this litigation are derived from the provisions of these acts. The construction to be placed upon the Charter powers granted by these two Sessions of the Legislative Assembly, in view of Section II of Article XI of the Constitution of Oregon as it then existed, and the subsequent adoption of the "Home Rule Amendments", and the adoption of the Public Utility Law, brought about the controversy in this case.

Section 6 of the Charter of City of Salem was amended by the Legislative Assembly in the year 1891 (Oregon Laws 1891, page 1088), which took effect by virtue of an emergency clause on the 21st day of February, 1891, —not quite two months before the franchise granting to the Water Company's predecessors the right to use the

streets and alleys to supply the city and its inhabitants with water.

These sections, so far as they define the rights of the city, are as follows:

> "The mayor and aldermen shall comprise the common council of said city, and at any meeting shall have exclusive power—
>
> To provide for lighting the streets and furnishing the city and the inhabitants thereof with gas or other light, and with pure and wholesome water, and for such purposes may construct such water, gas or other works, within or without the city limits, as may be necessary or convenient therefor; provided, that the council may grant and allow the use of the streets and alleys of the city to any person, company or corporation who may desire to establish works for supplying the city and the inhabitants thereof with such water or light upon such terms and conditions as the council may prescribe.
>
> To permit, allow and regulate the laying down of tracks, street cars and other railroads upon such streets as the council may designate, and upon such terms and conditions as the council may prescribe; to allow and regulate the erection and maintenance of poles or poles and wires for telegraph, telephone, electric light or other purposes, upon or over the streets, alleys or public grounds of the city; to permit and regulate the use of the streets, alleys and

public grounds of the city for laying down and repairing gas and water mains, for building and repairing sewers and the erection of gas or other lights; to preserve the streets, alleys, side and crosswalks, bridges and public grounds from injury, and prevent the unlawful use of the same, and to regulate their use; to fix the maximum rate of wharfage, rates for gas or other lights, for carrying passengers on street railways, and water rates."

The Legislative Assembly in 1903, under the same constitutional provision, amended Section 6 by adding sudivision 41 (Laws 1903, page 359) as follows:

"The Mayor and Aldermen shall comprise the Common Council of said city, and at any meeting thereof shall have exclusive power:

To license, regulate, and tax telephone companies, telephone offices, and telephones, and to fix the maximum rate to be charged by telephone companies for the rental and use of telephones; to license, regulate, and tax water, gas, and electric light and power companies, and to fix the maximum rates to be charged by any person, company, or corporation for water, electric or gas light, or power, supplied by such person or company to private or public consumers within the city; to license, regulate, and tax express and telegraph companies; and to license, regulate, and tax bicycles, tricycles, tandems, and automobiles, and to reg-

ulate, control, or prohibit the use of any thereof on the streets of the city."

It may be noted that at this session of the Legislature subdivision 6 of Section 6 of the Charter, already quoted, was amended so as to read as follows:

> The Common Council may have power to contract for water and lights for city purposes, or to lease, purchase, or construct a plant or plants for water or light, or both, for city purposes, in or outside the city limits. The council of the City of Salem shall, at all times, under the limitations herein set out, have the power to provide, by ordinance, for lighting the streets, and all public and private places in the city, and furnishing water to the inhabitants thereof; to provide for the acquisition, ownership, construction, and maintenance of water works, gas works, electric light works, steam, water, or electric power works, heating works, telephone lines, street railways, bridges, and ferries, and such other public utilities as the council may designate, and to issue bonds therefor; Provided, however, no contract of (or) agreement for the purchase, condemnation, ownership, construction, or operation by the city of any public utility shall be entered into, nor bonds be issued therefor, by the council, without first submitting such proposed contract or agreement to the qualified voters of the city. * * (Provisions for submitting

question to voters omitted.) * * Provided, that the council may grant and allow the use of streets and alleys of the city to any person, company, or corporation who may desire to establish works for supplying the city and inhabitants thereof with such water or light upon such terms and conditions as the council may prescribe.

Pursuant to these provisions of the Charter the Common Council of the City of Salem, Oregon, passed an ordinance, which was approved on the 16th day of April, 1891, as follows:

"ORDINANCE NO. 207

An Ordinance providing for the laying down of pipes for water in the streets and alleys of the City of Salem, by the Salem Water Company.

Be it Ordained by the Common Council of the City of Salem, Oregon:

Section 1. (This section was amended by Ordinance No. 346, which ordinance is hereafter set out.)

Section 2. (Places Furnished Free). That the Salem Water Company, its successors and assigns, shall furnish the City of Salem, free of charge, with water for two fountains in Wilson Avenue and one in Marion Square, from the first day of May to the 31st day of October of

each year, and water for the use of all engine houses, rooms for firemen's meetings, the council chambers, the city prison, and all offices in the city buildings used by any of its officers or agents, and shall also furnish water for a public drinking fountain for man and beast at such place as may be designated by the Common Council.

Section 3. (Duties of Water Company: Pressure). The said Salem Water Company, their successors or assigns, shall at all times keep a sufficient supply of good, wholesome water in the distributing mains in the City of Salem to supply all demands upon them for water within said city. The said Salem Water Company, their successors or assigns, are hereby required, for the purpose of connecting hydrants, to tap their mains whenever and wherever required by the City of Salem, Oregon, and of any size demanded, not in excess of the size of the main tapped, and shall also make a proper connecting joint therefrom of inside measurement of at least the same size as the tap suitable and proper for connecting the hydrant main to, and keep it in repair and to lay mains to any part of the city, when needed or required by the City of Salem, for supplying hydrants erected or to be erected, but said mains shall not be less than four inches in diameter, inside measurement, without cost or charge to the city of Salem; and the pressure

of the water at each and all hydrants of the city, now erected or which may hereafter be erected west of east side of Twelfth street and south of north side of Division street, and north of south side of Mill street, shall be at least sixty pounds at any and all times.

Section 4. (Rates). The said Salem Water Company, their successors or assigns, shall not charge, at any time, higher rates for water than is customarily allowed for water in towns or cities of like population on the Pacific Coast but the Salem Water Company, its successors or assigns, shall not at any time charge more than one dollar and eight-two cents ($1.82) per month for each hydrant or cistern actually supplied. And the right is hereby reserved by the City of Salem to continue or discontinue, to connect or disconnect any or all hydrants or cisterns connected, or which may hereafter be connected, with said works; and the City of Salem shall not pay for said hydrants or cisterns, while the same are disconnected or discontinued.

Section 5. (Municipal Ownership not Prohibited) Nothing in this ordinance shall be so construed as to prevent the City of Salem from erecting, buying or owning or operating its own works, for the purpose of supplying the city and the inhabitants thereof, or either, with water at any time.

Section 6. (Company's Consent to Amend)

This ordinance shall not be altered, amended, or repealed without the consent of the said Salem Water Company, except for the violation by them of any of the provisions of this ordinance.

Section 7. (Time Limit for Acceptance). The Salem Water Company, their successors or assigns, shall file their acceptance of this grant in writing with the City Recorder within ten days after the passage of this ordinance. (Passed April 15, 1891. Approved April 16, 1891)."

This ordinance, with the consent of plaintiff's predecessor, was amended by an ordinance passed by the Common Council on the 12th day of April, 1898, reading as follows:

ORDINANCE NO. 346.

An Ordinance to amend Section 1 of an ordinance entitled "An Ordinance providing for the laying down of pipes for water in the streets and alleys of the City of Salem, by the Salem Water Company."

Be it Ordained by the Common Council of the Cith of Salem, Oregon:

Section 1. (Amendment). That Section I of an ordinance entitled "An Ordinance providing for the laying down of pipes for water in the streets and alleys of the City of Salem, by

the Salem Water Company," be and the same is hereby amended so as to read as follows:

"Section 1. That the Salem Water Company, a corporation organized and existing under the laws of the State of Oregon, and its successors and assigns, be and are hereby granted the right, privilege, and franchise for the period of fifty years to lay down pipes and keep them in repair along the streets and alleys of said city and to excavate the streets and alleys, but in the doing of any of said acts said Salem Water Company, its successors and assigns, shall be amendable and subject to all ordinances now in force or which may be hereafter enacted or ordained relative to the excavation of streets or alleys, and also all ordinances relative to the streets and the use thereof, and all ordinances in which the doing of the acts would contravene. All pipes shall be laid not less than twelve inches below the surface of the street or alley and also not less than twelve inches below the surface of the established grade of the streets or alleys in which the same may be located or laid, and whenever it may be necessary to disturb streets, alleys, sidewalks or crosswalks in construction or repairing the said works, they shall be replaced by the said Salem Water Company, their successors or assigns, with as little delay as possible and put them in the same condition as found. The Salem Water Company, its suc-

cessors or assigns, shall be liable for any damage or injury that may occur by reason of any of its acts to persons or property. The said grant of authority and permission being upon the following condition and stipulation, to-wit:"

Section 2. (Municipal Ownership Not Prohibited). Nothing in this ordinance shall be so constructed as to prevent the City of Salem from erecting, buying or owning or operating its own works for the purpose of supplying the city and the inhabitants thereof, or either, with water at any time.

Section 3. (Company's Consent to Amend) This ordinance shall not be altered, amended or repealed without the consent of the Salem Water Company, except for the violation by them of any of the provisions of this ordinance.

Section 4. (Time Limit for Acceptance). The Salem Water Company, their successors or assigns, shall file their acceptance of this ordinance as amended, in writing with the City Recorder within ten days after the passage of this ordinance, (Passed April 12, 1898. Approved April 16, 1898).

ACCEPTANCE BY THE SALEM WATER COMPANY.

To the Honorable Mayor and Common Council of the City of Salem, Oregon:

In pursuance of a resolution of the board of directors of the Salem Water Company, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, which resolution was passed by said board of directors on the 18th day of April, A. D. 1898, the Salem Water Company, through its president, J. M. Wallace, to which corporation saip rights and privileges were granted, hereby accepts Ordinance No. 346, of the City of Salem entitled "An Ordinance to amend Section I of an ordinance entitled 'An Ordinance providing for the laying down of pipes for water in the streets and alleys of the City of Salem, by the Salem Water Company.'"

Said ordinance having been passed by the Common Council of the City of Salem, April 12, A. D. 1898, and approved by the Mayor of said city on the 16th day of April, A. D. 1898.

(Signed) SALEM WATER COMPANR,
By J. M. Wallace, as President.

Dated the 18th day of April, A. D. 1898.
(Recorded, April 18, 1898).

Subsequent to the passage of Charter provisions

above set forth the Constitution of the State was amended by the adoption of the "Home Rule Amendment." These amendments were adopted at the general election held June 4, 1906, and became effective by proclamation of the Governor on June 25th, and are as follows:

Article XI, Sec. 2.

"Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the constitution and criminal laws of the state of Oregon."

Article IV, Sec. 1a.

"The referendum may be demanded by the people against one or more items, sections, or parts of any act of the legislative assembly in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections, or parts of an act shall not delay the remainder of that act from becoming operative. The initiative and referendum powers reserved to the people by this constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation, of

> every character, in or for their respective municipalities, and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the iniative and referendum powers as to their municipal legislation. Not more than ten per cent of the legal voters may be required to order the referendum, nor more than fifteen per cent to propose any measure, by the initative, in any city or town.

It is the established rule of construction in the State of Oregon that these two provisions having been adopted at the same time are to be construed together; State vs. Astoria, 79 Ore. 10; 154 Pac. 399 and authorities cited.

In 1911 the Legislative Assembly passed the Public Utility Act, found on page 483 of the 1911 Session Laws. As the act was referred to the people for approval or rejection at the ensuing general election, it did not becone effective until the 29th day of November, 1912. In Woodburn vs. Commission, 82 Or. 116, in construing this act, the Oregon Supreme Court say:

> "The Public Utility Act is similar to the legislation which has been adopted in most of the states, and confers upon the commission the power to regulate telegraph, telephone, street railroad, heat, light, water, and power plants so that a safe and adequate service may be rendered to the public at reasonable and

sufficient rates. The term "public utility" embraces every owner operating a telephone plant for the public "and whether said plant or equipment or part thereof is wholly within any town or city, or not:" Section I. Power to regulate public utilities is conferred upon a commission which was, at that time, called the Railroad Commission of Oregon (Section 6), but is now known as the Public Service Commission of Oregon: Laws 1915, p. 347. Every public utility is required to furnish adequate and safe service, and unjust or unreasonable charges are prohibited. The Commission may hold a hearing (Section 42), on the complaint of patrons that the rates being charged are unreasonable or unjustly discriminatory (Section 41), or on the complaint of any public utility "as to any matter affecting its own product or service" (Section 46), or an investigation may be made on the motion of the commission (Section 45); and "if upon such investigation, any rates * * shall be found to be unjust, unreasonable, insufficient or unjustly discriminatory * * the commission shall have power to fix and order substituted therefor such rate or rates, * * as shall be just and reasonable * *

(Section 43); and, furthermore, the commission "shall determine and by order fix reasonable rate or rates, * * in lieu of those found to be unjust, unreasonable, insufficient

or unjustly discriminatory * * (Section 51)."

Section 61 of the Public Utility act provides as follows:

> "Power of Municipality to Regulate Utilities; Appeal. Every municipality shall have power—
>
> (1) To determine by contract, ordinance or otherwise the quality and charactor of each kind of product or service to be furnished or rendered by any public utility furnishing any product of service within said municipality and all other terms and conditions not inconsistant with this Act upon which such public utility may be permitted to occupy the streets, highways or other public property within such municipality and such contract, ordinance or other determination of such municipality shall be in force and prima facie reasonable. Upon complaint made by such public utility or by any qualified complaint as provided in Section 41, the Commission shall set a hearing as provided in Section 42 and if it shall find such contract, ordinance or other determination to be unreasonable, such contract, ordinance or other determination shall be void. Provided, however, that no ordinance or other municipal regulation shall be reviewed by the Commission under the provisions of this section which was prior to such review enacted by the initiative or which was prior to such review re-

ferred to and approved by the people of said municipality or while a referendum thereon is pending.

(2) To require of any public utility by ordinance or otherwise such modification, additions and extensions to its physical equipment, facilities or plant or service within said municipality as shall be reasonable and necessary in the interest of the public, and to designate the location and nature of all such additions and extensions, the time within which they must be completed and all conditions under which they must be constructed subject to review by the Commission as provided in this section.

(3) To provide for a penalty for non-compliance with the provisions of any ordinance or resolution adopted pursuant to the provisions hereof.

(4) The power and authority granted in this section shall exist and be vested in said municipalities, anything in this act to the contrary notwithstanding.

The Legislative Assembly of the State of Oregon, on the 16th day of February, 1911, passed an Act known as

CHAPTER 80

"An Act Authorizing and empowering any incorporated city or town owning, controlling or operating a system of water works or electric light and power system for supplying

water or electricity for its inhabitants, and for general municipal purposes, and authorizing and empowering any person, persons, or corporation, operating or controlling any water or electric light and power plant under lease, contract or ownership, to sell, supply and dispose of water or electricity to individuals and corporations, within or without the corporate limits of such incorporated city or town, and to contract in reference thereto, and provide for the ratification of contracts made with persons or corporations concerning the same, prior to the passage of this act.

(Section 1 omitted).

Section 2. All contracts or agreements heretofore made, and now in effect for the sale and disposal of water or electricity, by incorporated cities and towns, and by any person, persons, or corporation, operating, controlling or owning water or electric light and power systems, to any person, persons or corporation within or without the limits of such incorporated city or town, in which such system is operated, are hereby ratified and declared legal and valid contracts, insofar as the right of such city or town to contract with reference to same is concerned."

Under Section 63 of the Public Utility Act it is provided as follows:

"Section 63. Unjust Discrimination, Pro-

hibited; Definition; Penalty; Permissible Free or Reduced Rate Service.—If any public utility or any agent or officer thereof shall, directly or indirectly, by any device whatsoever or otherwise, charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it in or effecting it relating to the transportation of persons or property by street railroad or to the production, transmission, delivery or furnishing of heat, light, water or power or the conveyance of telegraph or or telephone messages or for any service in connection therewith than that prescribed in the public schedules or tariffs than in force or established as provided therein, or than it charges, demands, collects or receives from any other person, firm or corporation for a like and contemporaneous service under substantially similar circumstances, such public utility shall be deemed guilty of unjust discrimimation, which is hereby prohibited and declared to be unlawful, and upon conviction thereof shall forfeit and pay into the State treasury not less than one hucdred dollars, nor more than one thousand dollars for each offense; and such agent or officer so offending shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars and not more than one hundred dollars for each offense. Pro-

vided, that this provision shall not be construed to prohibit the privilege of passes or franks or the exchange thereof with each other for the officers, agents, employees and their families of street railroads, telegraph, telephone and cable lines, and the officers, agents, employees and their families of other street railroads, telegraph, telephone and cable lines and with the the officers, employees and their families of railroad, express and sleeping car lines, union depots and other common carriers. Provided, however, that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services. Nothing herein shall prevent the transportation of persons or property or the production, transmission, delivery or furnishing of heat, light, water or power, or the conveying of telegraph or telephone messages within this State free or at reduced rates for the United States, the State, or any municipality thereof, or for charitable purposes, or to employees of any such public utility for their own exclusive use and benefit, nor prevent any such public utility fromgiving free transportation or service, or reduced rates therefor, to its officers, agents, surgeons, physicians, employees and attorneys at law, or members of their families, or to former employees to such public utilities or members of their families where such

former employees have become disabled in the service of such public utility or are unable from physical disqualification to continue in the service, or to members of families of deceased employees of such public utility; to ministers of religion, inmates of hospitals and charitable and eleomosynary institutions and persons exclusively engaged in charitable and eleomosynary work. The Commission may in its discretion require to be filed with it by any public utility a list, verified under oath of the president, manager, superintendent or secretary of any public utility, of all free or reduced rate privileges granted by such public utility under the provisions of this section."

Pursuant to this section of the Act the City of Salem on or about the 20th day of May, 1913, filed with the Public Service Commission a complaint, wherein it prayed that the Public Service Commission have a valuation made of the Water Company's plant, and it was also alleged in Paragraphs V and VI of the complaint that the rates and tolls and charges of the Water Company, as shown by the schedules of rates on file with the Public Service Commission, were discriminatory and based upon arbitrary classifications, and was as well producing an income and revenue in excess of the reasonable return upon the money invested by the Water Company in its plant. A copy of this petition is attached to the answer and made an integral part thereof. It is to be noted that no issue was tendered by the com-

plaint, filed with the Commission that the rates and tolls being paid by the City, under the franchise contract with the Water Company were discriminatory, unreasonable or arbitrary. No complaint was made.

Subsequent to the filing of the petition, and on the 14th day of March, 1914, nearly a year subsequent to the filing of the complaint with the Public Service Commission, the Council adopted a resolution, No. 1294, as follows:

> "BE IT RESOLVED by the Common Council that the Railroad Commission in adjusting the rates of the Salem Water Co. for the City of Salem on the private users, that they take into consideration the price at which the hydrants should be charged to make an equitable rate for the private user, and if the rate now charged the City for hydrants by the Salem Water Co. is too high or too low, that it be adjusted accordingly. That the City Recorder be instructed to send a copy of this resolution to the Railroad Commission.
>
> Adopted by the Common Council this 16th day of March, 1914.
>
> Attest: CHAS. F. ELGIN."
>
> City Recorder."

It is the on Commission's order on this resolution that the Water Company claims that it is entitled to the difference between $1.82, the franchise rate, and $2.50 per hydrant per month. It is alleged in the answer, in connection with the adoption of this Resolution as follows:

Paragraph VII Amended Answer (Transcript, page 32).

Answering paragraph VII of plaintiff's complaint said defendants admit each and every allegation therein contained, and further allege that subsequent to the filing of said petition referred to in paragraph VI hereof, and which is "Exhibit A" of this amended answer with the Public Service Commission of the State of Oregon, and while the said petition was under consideration by said Commission, the members of said Com mission requested the City Attorney of defendant City to secure the adoption of a resolution by the Common Council of defendant City embodying the terms set forth in said Resolution No. 1294, but in and by Section VI of said Ordinance No. 207, and in and by Section III of said Ordinance No. 346, and in and by Section III of Ordinance No. 368, it was provided as follows:—

> "This ordinance shall not be altered, amended, or repealed without the consent of the said Salem Water Company, except, for the violation by them of any of the provisions of this Ordinance."

and thereafter, in accordance with the terms and provisions of said Ordinances, and a short time prior to the introduction of said Resolution No. 1294 into the Common Council of defendant City through its City Attorney, requested the plaintiff herein to join in said resolution and consent and agree with said defendant City, that said Public Service Commission should make a finding and determination as to the amount of

a just and reasonable charge for said defendant City to pay the plaintiff for supplying the hydrants of said defendant City with water, for the purposes hereinbefore alleged, and thereafter, the defendant City, through its Common Council would amend Section IV of said Ordinance 207 in accordance with the order, finding and decree of the said Public Service Commission as to the amount of a just and reasonable rate and charge to be paid by defendant City to plaintiff for furnishing and supplying the hydrants and cisterns of said defendant City with water, but said plaintiff refused to join with defendant City in said Resolution No. 1294 or agree or consent thereto prior or after the adoption thereof by the Common Council of said defendant City, and prior to a determination thereof by the Public Service Commission, and thereafter, defendant City for the purpose of securing and ascertaining the amount of a just and reasonable charge, rate and tariff to be paid by defendant City to the plaintiff for furnishing defendant City with water for its hydrants and cisterns, and only as advisory in such matters and not otherwise, defendant City adopted the aforesaid Resolution and caused to be filed with the said Public Service Commission said Reso ution No. 1294, so as to enable said defendant City thereafter, if it so desired to do with the consent of said plaintiff, so amend said Ordinance No. 207, and Ordinance No. 346 and No. 368, amendatory thereof, in accordance with the finding and determination of the Public Service Commission as to the amount of said rate and charge and tariff found to be just and reasonable, and defendant City

did never agree or contract with said plaintiff that said City would be bound or agree to the rate, charge, and tariff found to be reasonable by said Public Service Commission, in reference to any reduced or preferential rate fixed by defendant City, as a part of the consideration for granting plaintiff's Assignors the rights, privileges, and franchises hereinbefore alleged.

The Public Service Commission's order so far as material herein is as follows:

> 17. "By resolution of the Common Council of the City of Salem, adopted March 16, 1914, and filed with the Commission March 18, 1914, it was resolved that the Commission, in adjusting the rates of the defendant for private users, should take into consideration the price at which hydrants should be charged to make an equitable rate for the private user, and that if the rate presently charged the City for hydrants by the defendant should be too high or too low, it be adjusted accordingly.
>
> Pursuant to such request and from the record before it, the Com.nission finds the rate charged by defendant to the City of Salem for fire hydrants and cisterns is insufficient as compared with the charges made to private users, considering the relative demands of the service and the amount of investment on account of the City and private consumers, respectively: and that the present hydrant rate, $1.82, casts an undue burden upon other users than the City. The

effect of such unduly low rate is that patrons who use water have been compelled to pay and now pay more than a reasonable rate for their service to make up the deficiency in return for the service to the City from which they derive no benefit that is not equally shared by taxpayers and property owners who are not patrons of defendant. A just and reasonable hydrant rental is the sum of $2.50 per hydrant per month. In adjusting the schedule of rates for private water users above prescribed, the action of the Common Council of the City of Salem, and this finding as to a reasonable rate for hydrants, have been taken into consideration by the Commission.

The action of the Common Council of the City of Salem does not in terms contemplate any waiver of the franchise provision as to the furnishing of water for the other purposes required by the franchise, and the rates prescribed by the Commission for private users have been fixed in contemplation of the continuance of the free service afforded the City in return for the franchise granted."

The order of the Commission is made a part of the City's answer. It is alleged, in connection with the adoption of this resolution, that its purpose was only advisory. The demurer admits that it was never recognized by the City, and immediatly upon the Commission making an order increasing the rates the City ab-

solutely refused to recognize the binding force of the order by refusing to pay the increase toll. The resolution was adopted conditionally, that is that the consent of the Water Company was contemplated, before it should have any binding force. It is alleged in the answer that the City requested the Water Company to join in this petition, and that the Water Company refused to do so. It is further alleged that it is provided in the franchise contract between the Water Company and the City that the franchise contract cannot be amended by the adoption of a resolution. It requires an ordinance to effect an amendment. These facts will appear in the third seperate answer and defense. It is further alleged in the answer that the City had actually tendered the Water Company the sum of $1.82 for hydrant service for the consumption of water by the City required by the franchise.

The City has refused to pay the difference between the amount fixed by the order of the Public Service Commission, as required by Section 17 of the order, and the amount fixed in Section 4 of the franchise contract, found on page 6 of this brief, providing that the City shall not be required to pay more than $1.82 per month for each hydrant actually supplied. The order of the Commission became effective from the 1st day of October, 1914, (see page 74 of the transcript.) The City refused to pay the increase in tolls commencing from the first day of October, 1914; but stood ready to pay for its water service under the franchise rate of $1.82 per hydrant. On the 17th day of May, 1917, the defend-

ant in error filed an action at law against the plaintiff in error to recover for water tolls covering a period between October 31st, 1914, and April 1st, 1917, in the sum of $12,810,88, with interest. The City answered setting forth the constitutional, statutory, and charter provisions and facts herinbefore detailed. A demurer to the answer was sustained. The plaintiff in error refusing to plead further, the defendant in error then filed a motion for judgement on the pleadings which was allowed by the court, and judgement was thereupon entered against the plaintiff in error for the sum of $12,-810.88 with interest from the 21st day of May, 1917, in the sum of $602.11; judgment entered March 4, 1918.

SPECIFICATIONS OF ERRORS

The following are the specifications of error relied upon by the plaintiff in error, and which are intended to be urged by it on the writ of error as grounds of reversal of the judgement of the District Court, and are identical with the errors suggested under the head of "Assignment of Errors" in the printed transcript of record commencing at page 91 thereof, to-wit:

I

The Court erred in sustaining plaintiff's demurrer to defendants' amended answer.

II

The Court erred in sustaining plaintiff's motion for default judgement against the defendants.

III

The Court erred in sustaining plaintiff's motion for judgement on the pleadings and entering judgement thereon.

IV

The Court erred in entering judgement in this cause in favor of the plaintiff and against the defendants.

V

The Court erred in allowing any sums of money as interest on the amounts demanded in the complaint and entering judgement therefor.

Each of the foregoing assignments of error are based upon the grounds and for the reason that the same is contrary to law and decisions of the courts.

POINTS AND AUTHORITIES

I

The Public Service Commission derives its powers only from the statute, and has no authority except such as is expressly conferred on it, and possessing no statutory authority to abrogate a contract of the city or to change or modify the terms of the franchise contract between the city, as grantor, and the Water Company, as grantee, the order increasing the franchise rate for service furnished the city was void for want of authority.

People v. Public Service Com., 171 App. Div. (N. Y.) 910.

Public Service Com. v. I. C. R. R. Co., 274 Ill. 41.

City of Augusta v. Lewiston A. W. St. Ry. 114, Me. 24;

Commissioners v. O. R. & N. Co., 17 Or. 65;

State v. Corvallis & E. Ry. Co., 59 Or. 450;

Atcheson T. & S. F. Ry. Co., v. Corporation Commission—Olk—, 170 Pac. 1156.

II

A franchise granted under proper authority, which has been accepted and acted upon by the grantee and

its successors, is an executed contract which cannot be altered without the consent of both parties thereto.

Haines v. Eastern Oregon L. &. P. Co., 76 Or. 402;
Detroit U. R. v. Michigan, 242 U. S. 238.

III

A city has two classes of powers—the one legislative, public and govermental, in the exercise of which it is a sovereignty, and governs its people; the other proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and the city itself as a legal personality. In a contract for supplying itself and citizens with water, the city is exercising its business or propritarye powers, and while the rule against discrimination does not apply to municipal corporations, yet in the exercise of its proprietary powers it is usually governed by the same rules of general law that govern a private corporation.

3 Dillon Mun. Cor. 5th Ed. Section 108 et seq. also p. 2134;
Pond Public Utilities, Section 6;
Esberg Cigar Co. v. Portland, 34 Or. 287;
Omaha Water Co. v. Omaha, 147 Fed. 1;
Indianapolis v. Gas Co. 66 Ind 396;
Illinois Trust Co. v. Arkansas City, 76 Fed. 271.

Reed v. City of Anoka, 85 Minn. 294.

VI

The general power to contract delegated to the city in Section 3 of the Charter (Transcript page 23) as well as the power to provide the city with water; as well as the power to establish a fire department, and to provide for the prevention and extinguishment of fires (Transcript page 25-27) are sufficient in themselves to authorize the city to enter into a contract for furnishing its hydrants with water. In making such contract as one of the high contracting parties the city is exercising its proprietary or private rights as distinguished from its government or public functions.

Little Fall E. & W. Co. v. Little Falls, 102 Fed. 663;

Illinois Trust Co. v. Arkansas City, 76 Fed. 271;

Gosport v. Pritchard, 156 Ind. 400;

Webb City & C. W. Co. v. Webb City, 78 Mo. App. 422;

Saleno v. Neosho, 127 Mo. 627, 641;

Los Angeles City Water Co. v. Los Angeles, 88 Fed. 720.

V

The City of Salem was created by special act of the Legislature in 1862, and acts amendatory. Under the act of 1891, it was granted exclusive power to contract for supplying itself and inhabitants with water on such terms and conditions as its council may prescribe. The city entered into a franchise contract with a water company, granting the company the right to use the streets of the city for fifty years for laying its pipes and mains, and provided that certin places should be furnished with water free, and for other purposes, at a contract rate of $1.82 per month for each hydrant used by the city during the life of the franchise. Rates for consumers were not fixed. The delegation of exclusive power, contained in the Act of 1891, to contract for water on such terms and conditions as the council may prescribe, authorized the city, as a part of the consideration for granting the use of the streets, to stipulate for its own water service a preferential and reduced rate, as betwwen itself and other consumers. The delegation of power amounted to a complete surrender of the police power to regulate rates, and when once exercised would be irrevocable during the life of the franchise. The power of the state to regulate rates is suspended during the life of the franchise.

3 Dillion Mun. Cor. 5th Ed., p 2239;
3 Thompson Cor., Sec. 2962;
Salem v. Anson, 40 Or. 343;
Omaha Water Co. v. Omaha, 147 Fed. 1;
Muncie Natural Gas Co. v. Muncie, 168 Ind. 97;

Cleveland v. Cleveland City Ry. Co., 194 U.S . 517;

State Ex. Rel v. Public Service Commission — Wash —, 172 Pac. 890;

Bessemer v. Water Works, 152 Ala. 391;

Birmingham W. W. Co. v. Birmingham, 211 Fed. 497;

Wichita W. Co. v. Wichita, 234 Fed. 415;

Home T. & T. Co. v. Los Angeles, 211 U. S. 265;

Detroit v. St. Ry. 184 U. S. 368;

Vicksburg v. Water Works, 206 U. S. 496;

Portland Ry. L. & P. Co. v. Portland, 201 Fed. 125; and authorities cited.

VI

By the terms of Section 2 of Article XI of the Constitution of Oregon, under which the city holds its present charter, and entered into the franchise contract in question, the Legislature of the State was expressly restricted from impairing of destroying the corporate rights of municipalities, and, hence, the rule that the contracts of municipalities are not within the protection of the Federal Constitution does not spply. In its executed contracts and corporate rights, a municipal corporation, as far as the Federal guarantees are concerned is subject to the same rules as a private individual or corporation.

Hartford v. Hartford Bridge Co., 10 How. (U. S.)

511, 533, 534;
Mt. Pleasant v. Beckwith, 100 U. S. 514;
Worcester v. Worcester R. Co., 196 U. S. 539;
Oregon Const. Article 11, Section 2; L. O. L. Page 118;
Also Article 4, Section 1a; L. O. L. Page 91;
Grogan v. San Francisco, 18 Cal., 613;
Dillon, Mun. Corp. 5th Ed. Sections 109-111;
Quinby v. Public Service Commission, 223 N. Y. 244; 119 N. Y. Sup. 1109.

VII

Legislative control over Municipal Corporations is not so transcendent and absolute as to extend to an arbitrary divesture of its private property and the destruction of rights of a private nature.

Dillon Municipal Corporations 5th Ed. Sections 109-111; and authorities cited; Cooley Const. Lim. 6th Ed. P. 288.
Note 35 Am. St Rep. 529 et seq.

VIII

Discriminations, unjust and unreasonable preferences in favor of the public were not held to be against public policy and unlawful at common law. In the

absence of a statute expressly prohibiting furnishing service to a municipality at a reduced rate, or a free service, such discrimination or preference cannot be held illegal as a matter of law, without overturning the foundation upon which the rule is built. Hence, the city stipulating for a free service for its public buildings and parks, and in fixing a reduced and discriminatory rate for itself for other purposes, in its franchise contract with the Water Company, entered into a lawful contract not prohibited by the Public Utility Act. But on the contrary, the latter part of Section 63 of the Public Utility Act expressly recognizes the validity of such discrimination, preferences and concessions, and the Commission exceeded its jurisdiction in intermeddling with the terms of the franchise contract in this respect.

Pond Public Utilities, Section 223;
Wyman, Public Service Corporations, 1304;
Public Utility Act, General Laws 1911 C. 279, Sec. 63;
City of Belfast v. Belfast W. Co., — Me—, 98 Atl. Rep. 738;
New York Tel. Co. v. Siegel Cooper Co., 202 N. Y. 511; 36 L. R. A. (N. S.) 560;
Superior v. Tel. Co., 141 Wis. 363; 122 N. W. 1023.;
Fretz v. City of Edmond,—Olk—, 168 Pac. 800.

IX

All prior contracts for the furnishing of water between cities and water companies were expressly validated and continued in force by the Legislature.

Or. Laws 1911, Chapter 80, Sec. 2.

X

The provisions of the Public Utility Act, found in Section 61, refer to franchise contract provisions fixed by municipalities for the benefit of private consumers, and fixing tolls and charges to be paid by them, and not to the terms of a franchise as between itself, as grantor, and the Public Service Corporation, as grantee. Section 61 of the Public Utility Act must be read in pari materia with Section 63.

Electric Co. v. Utility Com., 88 N. J. L. 603; 96 Atl. 1013,

Belfast W. Co. v. City of Belfast, — Me —,; 98 Atl. 738;

Seton v. Hoyt, 34 Or. 279.

XI

A city being a governmental agency, is not within the provision of the Public Utility Act, inhibiting un-

just preferences and discriminations. The general rule is that the sovereign or its agencies are not bound by the words of a statute unless expressly named.

State ex rel v. Peninsular T. Co., 75 Southern Rep. 201, Adv. Sheets;
Seton v. Hoyt, 34 Or. 266.

XII

The doctrine of waiver, ratification and estoppal do not apply to cases where the action of the city is ultra vires.

3 McQuillin Mun. Corp. Section 1172; et seq
Also Section 1256.

XIII

Jurisdiction cannot be conferred by consent; nor can jurisdiction be conferred by waiver.

City of Augusta v. Lewiston A. & W.St.Ry. 114 Me. 24.

XIV

Waiver is the intentional relinquishment of a known

right, benefit or advantage, or such conduct as warrants an interference of the relinquishment or such right. There can be no waiver unless so intended by one party and so understood by the other, or one party has so acted as to mislead the other and is estopped.

16 Cyc 805; 40 Cyc 261;

ARGUMENT.

This is a controversy between a municipality and a public service corporation, arising out of the terms and conditions prescribed and fixed by the Common Council in a franchise contract granting and allowing a water company the use of the streets of the city to lay its pipes and mains, for the purpose of supplying the city and its inhabitants with water. The precedents, in cases where the controversies have been between a public service corporation and a public utility commission empowered to regulate and fix the rates. tolls and charges for a given service, after a hearing as to the reasonableness of the rates as between the private consumer or public, and the corporation furnishing the service, are of little value as announcing any legal principles applicable to the controversy which arises in this case, except in those few cases, where under legislative authority the rates and tolls to be charged by the public service corporation for supplying the city and its inhabitants with service, were fixed by an agreement as a part of the consideration for granting the use of the streets to a public service corporation, and which the courts have held to constitute a surrender of the police powers of the state to the municipality to fix rates, and any subsequent reduction of the rates fixed, by the municipality, impaired the obligation of the contract.

In those cases, the controversy was between the public service corporation and the city or state, changing the rates or tolls prescribed and fixed in the franchise

contract for the service furnished private consumers, or the public and not for service furnished the city as a part of the consideration of the franchise contract. There seems to be but few reported cases where there has has been an attempt, either on the part of the city, or a public utility commission, acting with delegated authority, to change the rate for service furnished a city for itself under its franchise contract with the public service corporation. We have carefully collated these cases, and they are to be found under Paragraphs 3 and 5 of our points and authorities. None of them sustain an order of a utility Commission modifying the terms of a franchise contract between the grantor and grantee where a rate is fixed for the service to be given the grantor by the grantee for a fixed period.

The cases are distinguishable on the principle that in the case where the contorversy was over the rates and tolls for furnishing the public consumers with water, the question presented was one involving the exercise of the police power of the state—a power legislative in nature —and in the case under consideration, the controversy is over the term of a franchise contract, and the performance thereof, involving the exercise of the private and proprietary powers of the municipality.

This distinction is clearly pointed out by Judge Harris in the case of Woodburn v. Public Service Commission, 82 Or. 114, relied upon by the water company in the court below as decisive of every issue of the case, and which will be discussed later on. Judge Harris of the

Oregon Supreme Court pointed out the distinction as follows:

> "Throughout the discussion there must be borne in mind that the State, acting through the Public Service Commission is a party to this suit, and consequently judicial precedects arising out of controversies between none but the immediate parties to a franchise, are not controlling here. Moreover, the present juncture does not call for a decision of the relative rights of the grantor and grantee of a franchise, as between themselves. Furthermore, the very purpose of this litigation is to determine whether the State has in fact empowered Woodburn to fix a schedule of rates, which the State could not afterward change, and hence we must also distinguish all those judicial utterances which followed a finding that the State had actually conferred upon a city the power unalterably to fix the rates to be charged by the grantee of a franchise."

It is our first contention in this case, that the city, bya grant from the Legislature under the legislative act of 1891, was given authority to negotiate and execute a contract with a Water Company to supply itself and citizens with water and that one of the considerations stipulated in the contract and reserved by the city as a special benefit for allowing the Water Company's predecessors the use of the streets to lay its pipes and mains, was that the city should not be required to

pay more than $1.82 per hydrant or cistern during the life of the franchise, and by an acceptence of the franchise, and acting upon it by both parties, the franchise granted has become an executed contract, and cannot be altered without the consent of the city. And that the city in negotiating the contract in question, for the service to be furnished itself, whether preferential or otherwise, was acting in its private and proprietary capacity, and should be treated in the same manner as a private individual or corporation, and is subject to the same rules of law, restrictions and responsibilities, but bearing in mind that discriminations, unjust and unreasonable preferences in favor of the state and its municipal agencies were not held to be against public policy and unlawful at common law, and the Oregon public utility act did not attempt to change this rule and any change or revision of the terms of the franchise contract fixing a preferential rate for the city's own service as between the city and the water company, except in accordance with its stipulations, by the Public Utility Commission, during the life of the franchise, amounts to an impairment of the city's contract, in violation of federal guarantees.

As preliminary to a discussion of the terms of the grant from the Legislature it may be well to observe that the granting of authority to Public Service Companies to use the streets is a legislative act, and it may be exercised directly by the Legislature, or be delegated by that body to a municipal corporation. Professor Pond, in his recent work on Public Utilities, Section 117, says:

> "As before stated, the state has exclusive control over its highways, including the streets of municipal corporations, and this control remains exclusively in the state, except in so far as it may be delegated to the municipality, which accordingly has only so much power to control the streets and grant special privileges for their use as has been clearly conferred upon it by the legislative authority."

In Salem v. Anson, 40. Or. 343, an Oregon case which construes the extent of the authority of the common Council over the streets of the city, delegated to it by the **identical charter provision under consideration** the Supreme Court observes:

> "The legislature has thus delegated to the city the power of regulating and contolling the use of the streets by light and water companies, and vested it with exclusive authority to grant to such companies the privilege of so using them, upon such terms and conditions as the council may prescribe. The paramount authority over streets and highways is vested in the legislature as the representative of the entire people. It may, however, delegate to municipal corporations such a measure of its power as it may deem expedient, and the local authorities, by virtue of such delegation, can enact ordinances and local laws, which have within their jurisdiction, the force of the general statutes of the state."

The right then of the city in this case, to agree with the Water Company's predecessor upon the terms of the rate or toll which the defendant city should pay for the service of its cisterns and hydrants, furnished by the Water Company depends upon the extent of the grant to the city by the Legislative Assembly to contract with the water company's predecessor for the hydrant service in question. Are the charter powers of the city of Salem as conferred by the Legislative Assembly, sufficient to authorize the city to contract wiih the Public Service Corporation, in consideration of granting the right to use the streets, fix the rate during the life of the franchise that the city should pay for services furnished it by the water company? Did the city have the right to secure for itself some present or future benefit for granting the Water Company's predecessor this valuable franchise which would not be subject to revision or change.

We believe that the Legislative grant of power, quoted, was sufficient to authorize the city to make the franchise contract it in fact made with defendant's in error predecessors that there was a complete surrender by the Legislature of the sovereign power of the State to the city to contract in respect to the use of the streets on such terms and conditions as the council, acting either in its proprietary or governmental capacity might fix or determine, and thereafter any subsequent change in the franchise contract, either increasing or decreasing the rate to be paid by the city for the service furnished by the water company is an impairment of the city's contract, and is a taking of its property without

due process of law, and a denial of the equal protection of the law, in violation of Federal guarantees. And n must not be lost sight of, throughout this discussion, in considering these constitutional guarantees, that a municipal sub-division of the State of Oregon, organized by a Legislative Charter, pursuant to Section 2 of Article XI of the Constitution of 1859, is in its existing contracts rights just as much within the protection of the guarantees of the Federal Constitution as any private corporation, for that section of the Oregon Constitution provides that:

> "All laws passed pursuant to this section may be altered, amended or repealed, but not so as to impair or destroy any vested corporate rights."

By the terms of this provision municipal and private corporations are governed by the same rules of law in respect to their executed contract right as private individuals and corporations except the rule against unjust discriminations does not apply.

This phaze of the question will be discussed later. But it may be observed this rule is particularly true in respect to its rights while acting in its proprietary capacity.

Municipal corporations are said to possess two classes of power, namely: those which are granted for public purposes exclusively, and which are deemed to belong to the municipality in its public, political and municipal character, and are designated as legislative and govern-

mental in nature, and those where the powers granted are for the purpose of private advantages and emolement, and, notwithstanding the public may derive a common benefit therefrom, the corporation acts in its private or proprietary capacity. It is important that this distinction be kept in mind throughout the discussion of this case. The fixing of a franchise rate by the city for the service extended the city by plaintiff, as a part of the consideration for the privilege of using the streets, is to be viewed as an exercise of the contract powers of defendant city, acting in its private capacity in furtherance of its own interests. For the city sought, as a consideration and private emolument for its own benefit, for granting the right to the Water Company's predecessor to lay pipes and mains in its streets to secure unto itself a preferential rate for service as a part of its contract, and in the exercise of this right, the city was acting in its proprietary and business capacity, and is to be treated by the same rules of law as a private individual or corporation with the exception noted. Dillon, 5th Edition, Sec. 1303, page 2134, clearly announces this principle. The text is as follows:

> "If the municipality obtains its supply of water or light by a contract with a public service corporation or an individual, it acts in its so-called private and proprietary capacity in negotiating and executing the contract, and in questions arising in the performance of the contract the municipality should be treated in the same manner as a private individual or corpor-

> ation and is subject to the same general rules of law, restrictions and responsibilities."

It is held, however, by all the authorities in cases where the charter powers are as broad as in this instance, that a city in contracts for supplying itself and inhabitants with water is not acting in its general governmental capacity, but is acting in its business and commercial capacity. Professor Pond, in Section 6, states the law as follows:

> The municipal corporation in contracting for the construction or purchase of plants providing such public utilities as gas, water or electric lights, while acting within the scope of their authority as conferred upon them by statutory enactment, either expressly or by necessary implication, is not exercising its governmental functions but is acting in its private business capacity for its own special benefit and the advantage of its citizens and is liable in the same way and to the same extent as a private individual or corporation."

As authority for the text he quotes from the case of Omaha Water Company v. Omaha, 147 Fed. 1, which he observes furnished an excellent state, ment and pertinent application of the principal, as follows:

> "In holding the defendant city liable under its contract to purchase the property of the water-works company made pursuant to prop-

er legislative authority and by the exercise of the option to purchase provided for in the franchise granted by the city to the plaintiff, the court says: 'A city has two classes of powers, the one legislative or governmental, by virtue of which it controls its people as their sovereign, the other proprietary or business, by means of which it acts and contracts for the private advantage of the inhabitants of the city and of the city itself. In the exercise of powers which are strictly governmental or legislative the officers of a city are trustees for the public and they may make no grant or contract which will bind the municipality beyond the terms of their office because they may not lawfully circumscribe the Legislative powers of their successors. But in the exercise of the business powers of a city, the municipality and its officers are controlled by no such rule and they may lawfully exercise these powers in the same way and in their exercise the city will be governed by the same rules which control a private individual or a business corporation under like circumstances. In contracting for the construction or purchase of water-works to supply itself and its inhabitants with water a city is not exercising its governmental or legislative, but is using its business or proprietary powers. The purpose of such a contract is not to govern its inhabi-

tants, but to obtain a private benefit for the city and for its denizens.'"

These two classes of powers, and the legal rights which arise out of them, received a thorough consideration in the case of Indianapolis v. Gas-Light Coke Company, 66 Indiana, 396. The court in this case says:

"This power to legislate within the authority delegated to them by law is distinct from the power to contract, although exercised by the same corporation. They cannot by contract delegate or restrict their legislative power, nor can they, merely by their legislative power' make a contract. These two powers need not be confounded. The exercise of the legislative power required the consent of no person except those who legislate; while it is impossible to make a contract without the consent of another,or others. We think, therefore, when the city of Indianapolis made the contract in question with the Gas-Light Company it made it in the exercise of its power to contract, and not in the exercise of its power to legislate, although the power to make the contract was authorized by an ordinance; and, having the power to make a contract touching the subject-matter, it had the right to make it according to its own discretion as to its prudence or good policy, within the limits of its franchise."

Says the United States Circuit Court of Appeals,

eighth circuit, in Illinois Trust & Savings Bank v. Arkansas City, 76 Fed. 271, (34 L. R. A. 518):

> "A city has two classes of powers,— the one legislative, public, governmental, in the exercise of which it is a sovereignty, and governs its people; the other, proprietary, quassi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class it is governed by the rule here invoked. In their exercise it is ruling its people and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation * * In contracting for waterworks to supply itself and its inhabitants with water,the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city and its denizens."

The city, in granting the franchise in question to the water company's predecessor did so by ordinance, as is required by charter provision. It sought as a personal and private benefit to itself certain benefits and advantages. It provided that the engine houses, council chambers, city prison and office buildings should be furnished with water free of charge, as well as the furnishing free of charge water for public drinking fountains for man and beast, at such places as the council should designate. In addition to this service, required to be furnished gratis, the city sought to secure a water service at a low rate for other municipal purposes, and therefore, it secured as an additional consideration in the franchise, that the water should be furnished at the specified rate or toll of $1.82 for each hydrant and cistern belonging to the city. It left the question of water rates for service furnished for private consumers or the public to be taken care of in the future. While the Common Council had ample power to fix rates for private consumers or the public during the life of the franchise under the charter provisions quoted it refrained from doing so and left the regulation of water tolls open for future action by providing in section IV of Ordinance No. 207 that the water company shall not charge at any time higher rates for water than is customarily allowed for water in towns or cities of like population on the Pacific Coast. But as far as the city's water rates were concerned they were unalterably fixed and determined for the life of the franchise.

It is quite clear that the city, in incorporating these stipulations into its contract with the water company's

predecessors, was contracting in its proprietary and business capacity, as it had authority to do under the charter provision heretofore mentioned. Theses stipulations and covenants are not unusual in franchise contracts Reported cases sustain such provisions in franchise contracts, as furnishing water free to churches and schools. Discussing the terms and stipulations of a franchise between a municipality and a water company, Judge Dillon, in his last edition on Municipal Corporations, Section 1326, says:

> "When a municipality grants to a water or light company the right to use the city streets to lay its pipes and mains and at the same time contracts for a supply of water or light for its use and for the use of its inhabitants by virtue of valid legislative authority conferred upon it its power to grant the franchise and to make the contract permits it to prescribe conditions and regulations as to the manner in which the the powers conferred shall be exercised, so far as such limitations and conditions are not inconsistent with the Constitution and with the statutory authority under which it acts. In the protection of the public interest it may attach such limitations and conditions as have a proper relation to the subject matter of the grant. Restrictions, limitations or conditions relating to and regulating rates have a proper relationship to the subject matter of the grant, and may, under proper legislative authority, be

made a matter of stipulation in connection therewith."

Wyman in his work on Public Service Corporations, says:

(Section 1304)

"It is moreover, well established that in granting any legal privileges to a public service company, if the franchise conferred bo no more than incorporation itself, the granting government of whatever grade it may be, may stipulate for free service for its own public purposes."

In the case of City of Belfast v. Belfast Water Company,—Maine—, 98 Atl. 739, not yet officially reported, a contention was made that the provisions of a franchise contract between a water company and the city, providing for free service to the city after a certain time, was invalid. The court held that there was not an illegal discrimination in favor of the public, and the contract was in this respect valid and legal. The court said:

"Another answer is that free service to the public is not at common law unreasonable and therefore unlawfully discriminatory. The law against unreasionable discrimination rests on public policy. It is forbidden because it is opposed to the interests of the public, which requires that all should be treated alike under like circumstances. Discriminations, how-

> ever, in favor of the public are not opposed to public policy, because they relieve the people generally of part of their burdens. In the absence of legislation upon the subject such discriminations cannot be held illegal as a matter of law, without overturning the foundation upon which the rule itself is built."

To the same effect is City of Superior v. Telephone Company, 141 Wis. 365, 122 N. W. 1023 These cases also sustain the proposition that any change in such rates impairs the obligation of the city's contract.

Defendant in error in the court below argued this case on the theory that the fixing of the sum of $1.82 per hydrant for the price of water furnished defendant by plaintiff during the life of the franchise involves a consideration of rate regulation, and cites the Home Telephone Company case, 211 U. S. 271, as an authority for the proposition that the city exceeded its authority to fix unalterably, during the life of the franchise, the rate or toll the city should pay for its own water service. That the fixing of rates in a franchise contract amounts to a surrender of a power of government, and unless the authority is clearly delegated to the city, the power does not exist. Specific authority for the purpose is required, and such authority is not found in the Salem charter.

Now viewing the franchise contract from this point, we are unable to see where the principles announced in the Home Telephone Company case deprive the city

of the power to fix rates for its own service—a preferential and discriminatory rate—as a part of the consideration for using the streets of the city for laying pipes and mains. This calls for a construction of the charter provision authorizing the city to contract for a supply of water for itself and citizens.

Bearing in mind that municipal corporations in the State of Oregon have never been formed or organized under general laws, until after the adoption of the Home Rule Amendment, but their charters were the subject of a special grant, or adopted by an act of the Legislative Assembly, and the power to alter or amend the charters of any municipal corporation was subject to the limitation that no vested corporate rights of the city should be impaired or destroyed, let us turn to the charter of the City of Salem and examine the extent of the grant made by the Legislative Assembly to the city to contract in reference to supplying itself and inhabitants with a supply of water, and what terms and conditions it might lawfully prescribe for granting defendants in error's predecessors the right to use the streets of the city to lay its mains and pipes. Laws 1891, page 1088, Section 6, sub-division 6, provides:

> "The Mayor and aldermen shall comprise the common council of said city, and at any meeting shall have exclusive power—
>
> To provide for lighting the streets and furnishing the city and the inhabitants thereof with gas or other light, and with pure and

> wholesome water, and for such purposes may construct such water, gas or other works, within or without the city limits, as may be necessary or convenient therefor; provided, that the council may grant and allow the use of the streets and alleys of the city to any person, company or corporation who may desire to establish works for supplying the city and the inhabitants thereof with such water or light upon such terms and conditions as the council may prescribe."

It is by virtue of this provision that the city entered into the franchise contract in question (Ordinance No. 207 and supplementary thereto). Whether the city had the power to enter into the franchise contract in question, requires a construction of this section of the charter by the court.

As to what is the extent of the power conferred by subdivision 6 of Section 6, quoted, it may be well to refer to the text of approved authors, and to judicial decisions construing like charter powers. It will be seen that in precedents herein referred to the controversies were where there was an attempt on the part of the city to decrease the rate or charge fixed by a franchise prescribing and fixing a schedule of rates to be charged by the Public Service Corporation, and in these cases the rule of law was invoked that nothing may be taken by implication against the city, and that a contract regarding a public franchise should be construed most favorably to the municipality, and these

cases also were decided under Constitutional provisions providing for the organization of municipalities under general laws, and that these general laws may be altered or repealed without any saving clause as to vested corporate rights of the municipality. The court held in these cases that as far as the Public Service Corporation was concerned that these contracts were protected by the provisions of the State Constitution and Federal Constitution, inhibiting the impairment of the obligation of contract, and that this section of the State Constitution, as between the corporation and the city, must be read in pari materia with the Constitutional provision providing that municipal corporations may be organized under general laws. It seems to us this rule should have a more liberal application in the city's favor in a case arising in a controversy as between the city and a grantee of one of its franchises, where there is an attempt to repudiate a part of the considerarion of the franchise contract on the part of the grantee. These cases were all decided upon the principle that the State had surrendered its sovereign power to legislate to the city, and the State had suspended its power to exercise the Legislative function for a given period of time.

Judge Dillon, in discussing public utilities, in relation to municipal affairs, on page 2239, Vol. 3. says:

> "Whether these limitations or restrictions are binding upon the municipality also, and form a contract on its part that during the term of the contract the corporation shall have

the right to exact charges within the maximum prescribed, is an entirly different question. The municipality having derived its powers from the legislature and contracting for a supply of water or light by virtue of statutory authority, any stipulations which it may enter into limiting or affecting its future powers as to rates must be founded upon express or unmistakable legislative authority. When the legislature has conferred such express or unmistakable authority upon the city, the city may, within the scope of such authority and in the absence of any special constitutional restriction, stipulate what rates may be charged by a water or lighting company for the service rendered to the city and its inhabitants, and may also stipulate that such rates shall not be reduced during the contract period, and in such case such stipulation, when thus authorized, constitute a valid and binding contract protected by the Federal Constitution. When the price of the service is established either by statute or by a valid and authorized contract with the municipality, whatever price is permitted to be charged must be deemed reasonable and binding upon the consumer.

But it has been held that the power to regulate rates is a governmental power, continuing in its nature, which, if it can be bargained away at all, can only be bargained away by an

authorized express stipulation, and if any reasonable doubt exists whether it has been bargained away, or whether the city has power to so bargain it away, the doubt must be resolved in favor of the continued existence of the power to regulate; and because of this principle of the law cases are to be found which deny the power of the municipality to contract that rates for water and other public services shall remain unchanged during a term of years. But it is believed that a close examination of these cases establishes that they were either founded upon the peculiar facts and circumcumstances of the particular case, or upon some reserved right by Constitution or statute, which subjected a rate prescribed by contract to future regulation by the legislature, or by the municipality acting under delegated power. The question whether a municipality has implied authority as an incident to an express power to contract for a supply of water for public and private use to stipulate that rates shall remain unchanged during the term of the contract has been fully considered in a series of cases, which arose in the State of Illinois, and the existence of any such implied power has been rejected by the Supreme Court of that State. That court holds that when a municipality is merely authorized to contract for a supply of water or gas to be furnished by a corporation, the municipality has no power to

bind itself by vising the rate for such supply for an entire or long future period of the contract. If, pursuant to such statutory authority, an ordinance be made granting the right to use the city streets for a term of years and fixing the rates to be charged, the rates so fixed will be regarded as merely declaratory that such rates were reasonable at the time of the grant and until changed in competent form, and the stipulation will not be deemed a contract which binds the city to recognize the rates as reasonable and controlling for the entire period. When these Illinoise cases came before the Supreme Court of the United States for final review, it was held, by a divided court, that under the statutes conferring authority upon the cities and providing for the organization of water companies, the question whether the power of the city to contract for a supply of water was intended by the legislature to be subject to a continued power of regulation of the rates by the municipalities, was so far involved in doubt that the construction ought to be adopted which was most favorable to the public, and therefore that it must be held that the right to regulate the rates was not affected. Other cases in which it was held that stipulations in contracts with a municipality for a public service which prescribed for a long fixed period the rates of public service to the municipality and its inhabitants did not exempt the

companies from future regulation of these rates, appear to be founded upon a right reserved to the legislature or to the municipality to so regulate and control the rates by constitutional provision, or by a statute antedating the making of the contract which expressly reserved that right or reserved the power to alter or amend, or by some enactment which formed a condition, express or implied, inhering in the charter authority of the company."

Thompson in his work on corporations, Vol. 3, Section 2962, says:

"A state legislature may, by clear and express provisions in the charters it grants, surrender the power to regulate the rates of corporations affected with a public interest. If, therefore, the legislature of a state does, in plain and unequivocal language, surrender to a corporation of its creation the power to regulate its rates and charges for its services to be rendered to the public, and the grant so made is accepted, the legislature may not thereafter recall the power thus surrendered. The same power to barter away the right to regulate may be esercised by a municipality authorized thereto by the legislature."

The text quoted referred to a number of decisions, with which we believe this court is familiar, for they were all considered and applied in a case before the

District Court, construing a certain franchise granted to the Street Railway System of Portland, where it was held that under the peculiar provisions of the Portland Charter, the Council was not authorized to contract away the right of regulating the fares to be charged by the Street Railway Company during the life of the franchise, and the defendant in error pointed to this case below as controlling the construction to be placed on the charter provisions of the city of Salem, but it is to be noted that there is no similarity in the charter grants of power between the two cities. In the Portland charter there was no such broad grant of power as is found in the Salem charter. By Section 112 it was provided that every grant or a franchise, which provides for the charging of rates, fares and charges shall contain a provision fixing the maximum rate of fares, rates and charges which the grantee, his, its, or their successors or assigns, can charge or collect for services rendered, etc., but the same section contained an additional provision that the council reserved the right to thereafter from time to time change, alter, regulate and fix fares, rates or charges which the grantee, his, its, or their successors or assigns, can charge or collect thereunder, during the life of such grant or franchise. A further provision was contained in the charter:

> "At all times the power and right reasonably to regulate in the public interest the exercise of the franchise or right so granted shall remain and be vested in the council and said power and right cannot be divested or granted."

The court says on this point:

"And this provision is carried into the complainant's franchise by express words. Here is a positive provision of the charter and franchise that the right to reasonably regulate in the public interest the exercise of the rights granted cannot be and was not granted away. The word "regulate" is a broad term. It is the word used in the Constitution of the United States to define the powers of Congress over interstate commerce, and it is hardly necessary to cite authorities to show that under such power Congress has the right to regulate the charges or rates for the transportation of freight or passengers by interstate carriers. Section 112 of the charter does not in terms or by necessary implication authorize or empower the city to enter into an irrevocable contract with the grantee of a franchise fixing the rates of fares which may be charged by such grantee. Such a contract is not indispensable or necessary to the exercise of the other powers granted. Moreover, the section must, we think, be read in connection with the other provision in the charter reserving to the city the right and power at all times to reasonably regulate in the public interest the exercise of a franchise granted by it. It is in the nature of a command from the supreme legislative power of the state to the city that it shall, in granting franchises which pro-

vide for a charge of fares, insert a provision fixing the maximum charges which the grantee or its assigns may charge or collect for services rendered during the lifetime of the franchise. It is a limitation rather than the grant of a power to contract or barter away the governmental right of regulating fares (Home Telephone & Telegraph Co. v. Los Angeles (C. C.) 155 Fed. 554-573), and the fact that no provision was entered in the franchise reserving to the city the right to change the rate cannot affect its power to do so."

On the other hand, the Supreme Court of Oregon, in a unanimous opinion, in the case of Salem V. Ansen, 40 Or. 343, in construing identical provisions under consideration, held that the legislature had delegated to the defendant city the exclusive power of regulating and controlling the use of the streets upon such terms and conditions as it may prescribe, which, in other words, means that there had been a complete delegation of power to the defendant city to contract in reference to its lights and water service. The charter provisions construed were the identical charter provisions involved in this case. The question involved was whether or not the city, under these charter provisions, had a right to exact a bond from a power company, conditioned that the terms of a franchise would be complied with. In construing the charter provision in question the court said:

"The legislature has thus delegated to the

city the power of regulating and controlling the use of the streets by light and water companies, and vested it with exclusive authority to grant to such companies the privilege of so using them, upon such terms and conditions as the council may prescribe. The paramount authority over streets and highways is vested in the legislature as the representative of the entire people. It may, however, delegate to municipal corporations such a measure of its power as it may deem expedient, and the local authorities, by virtue of such delegation, can enact ordinances and local laws, which have, within their jurisdiction, the force of the general statutes of the state: Tiedman, Mun. Corp. Sec. 289.

The granting of authority to public service companies to use the streets and highways is a legislative act, entirely beyond the control of the judicial power, so long as it is within proper constitutional limitations. It may be exercised directly by the legislature, or be delegated by that body to a municipal corporation; and, when so delegated, the municipality has, within the authority granted, the same rights and powers that the legislature itself possesses. To that extent it is endowed with legislative sovereignty, the exercise of which has no limit, so long as it is within the objects and trusts for which the power was conferred.

> It is admitted that the legislature may, by virtue of its paramount authority, require bonds or undertakings of the grantees of such privileges, conditioned that they will construct their works within a specified time, or that they will otherwise comply with the terms of their grant, and a municipal corporation to which the exclusive power over the subject has been delegated may exercise the same right. There is no express provision in the charter of Salem authorizing the council, upon granting the privileges to use the streets, to require that the work shall be done within a specified time; nor is it necessary. It is given the exclusive power to make the grant 'upon such terms and conditions 'as it may prescribe, which necessarily authorizes it to impose such reasonable conditions percedent or subsequent to the granting or exercise of the franchise as may be deemed necessary or proper, including a requirement that the grantee shall give a bond, conditioned as the one in suit."

This is an authoritive construction of the charter provision, and it would seem from the language used by the court that the state, through its Legislative Assembly, had surrendered its sovereign power over the streets of the city, in respect to contracting for light and water with any company, for the purpose of supplying the city and inhabitants with water.

In the first part of section 6 the Mayor and Common

Council are given the **exclusive** power to do numerous things, both in the performance of its Governmental functions and in its proprietary functions. The use of the word "exclusive" is significant, inasmuch as the use of that word would indicate that all power of the Legislative Assembly, as representative of the sovereign State, to legislate within the authority conferred and delegated, is vested in the Mayor and Aldermen of the defendant city. The Common Council is given exclusive authority by the terms of this grant to grant and allow the use of the streets and alleys to any corporation who may desire to established works for supplying the city and its inhabitants with water, upon such terms and conditions as the Council may prescribe. There is no residium of authority remaining in the legislature.

A statute of Indiana provided (Burns Rev. Stat. 1901, Sec. 3623) that, "The Common Council shall have exclusive power over the streets, highways, alleys and bridges within such city."

The City of Muncie, pursuant to this statutory authority, entered into a contract with a Gas Company for the supplying of the inhabitants with gas. The consumers' rates were fixed by the franchise contract, which gave the Gas Company the privilege of laying irs pipes and mains beneath the surface of the streets of the city. The Gas Company, finding the rates fixed in the franchise contract unsatisfactory, sought to increase the rates over those fixed in the franchise contract, and under threats of discontinuance of service to private consumers it was collecting from consumers a higher

schedule of rates than those fixed in the franchise contract. The city brought a suit to enjoin the breach of the covenants. It was claimed by the Gas Company that the franchise contract fixing a schedule of rates to be charged was ultra vires, and that the city had no authority to enter into a contract fixing the maximum rates to be charged the inhabitants of the city. The court said in Muncie Natural Gas Company v. Muncie, 168 Ind. 97, 60 L. R. A. 822:

> "We have to deal here with a question of ultra vires in its true sense; that is, where the act is claimed to be ultra vires the corporation itself. Municipal corporations possess and can exercise such powers only as are granted by the legislature in express words, and those necessarily or fairly implied or incident to the powers expressly granted, and those essential to the declared objects and purposes of the corporation. (Citing authorities)
>
> "The history of the workings of municipal bodies has demonstrated the salutary nature of this principle, and that it is the part of true wisdom to keep the corporate wings clipped down to the lawful standards." 1 Dill. Mun. Corp. Sec. 457. But, notwithstanding this background of inhibition, we think that it may be affirmed that appellee had power to enter into the contract in question. Section 61 of the act of March 14, 1867 (Burns' Rev. Stat. 1901, Sec. 3623), provides that "the common

council shall have exclusive power of the streets, highways, alleys and bridges within such city." Natural gas is a public utility that cannot be obtained by the citizens of a municipality generally, except as it is conducted in pipes along the public ways of the city. The grant of exclusive power to the Common Council over such ways comprehends the right to permit gas companies to use the streets. If the Common Council may permit a natural gas company to use the street without any conditions annexed except such as the law attaches, it is not perceived why, as in this case, in making provision for supplying, natural gas to all of the inhabitants of the city it may not protect such inhabitants against extortion by providing that the company shall not charge in excess of certain prices for its service. The right to annex terms by way of limitation upon the authority of the grantee in such cases has been often affirmed by this court. (Citing authorities). In Indianapolis v. Consumers' Gas Trust Co. 140 Ind. 116, 27 L. R. A. 517, 39 N. E. 436, it was said: "There was no compulsion on the part of the appellent to grant the privilege to use its streets to any particular company. It was within its discretion to give or not to give its consent, and it had the right to withhold it from all gas companies. Citizens' Gas & Min. Co. v. Elwood, 114 Ind. 332, 16 N. E. 624. It was

not limited alone to the granting of this franchise, but it had the right to prescribe and impose terms and conditions. Dill. Mun. Corp. Sec. 706; 2 Wood, Railroads, p. 986; Elliott, Roads and Streets, p. 565. When these terms and conditions, proposed by the appellant, were accepted by the appellee, and complied with, it became a binding contract." (Citing authorities). In Los Angeles City Water Co. v. Los Angeles, 88 Fed. 720, 731, the court said: "In procuring water, or any other commodity, by purchase, one of the first things to be considered and agreed upon is the matter of price. Therefore, to hold that a general power, without limitation, in a municipal corporation, to supply the city with water, does not include power to agree upon a price, it seems to me would be a solecism." The grant in this case may be said to rest upon the business or proprietary power of the city, as distinguished from its governmental or legislative power."

Again, the use of the words "upon such terms and conditions as the council may prescribe", taken by itself, is a grant to contract without limitation or exception. The council is vested, as far as the terms of any contract it may enter into with any public service corporation for furnishing water or light, with the right to enter into such a contract as their discretion and judgement dictated, unhampered by any terms and

conditions, except such as they choose to make. There is no boundry or limit to the contract which the city may enter into, if the usual and ordinary construction is given to the terms used in the legislative grant, and, therefore, the right to fix the rates the city itself should pay to the water company's predecessors for the service furnished the city as a part of the consideration for granting the franchise to lay pipes and mains in the streets of the city, was within the power of the council after an acceptance of the terms of the franchise, it is beyond the powers of the legislature to affect a change of its terms without impairing the obligation of the contract inhibited by Federal guarantees.

Such has been the construction placed by the courts on general statutes where these terms, or synonymous terms, have been employed as granting to municipalities the right to contract for supplying its citizens with a given public utility.

In the case of Cleveland v. Cleveland City Railway Company, 194 U. S. 517, it was held that where the legislature authorizes the city to fix the **terms and conditions** upon which street railways may be constructed, operated, extended and consolidated, that the city under this power could make a valid ordinance contract authorizing a consolidation of different railway systems within the city, and could legally fix the rate or fare for carrying passengers in the franchise agreement, which would be binding during the life of the franchise, and it was held by the Supreme Court of the United States, through the present Chief Justice

that this was an unalterable agreement, that the city could not reduce the rate or fare below that specified in the franchise contract, and that this contract was authorized by the delegation of the city of the power to fix the terms and conditions of the consolidation, and that reduction of the rate was an impairment of the obligation of the agreement. The terms of the statute were as follows: (Sec. 3443)

> "(Council, etc., may fix terms and conditions.)—Council, or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such (street) railways may be constructed, operated, extended, and consolidated."

Judge White, in speaking of the grant of power, by employing the words quoted, says:

> "The statutes show that there was lodged by the legislature of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended, and consolidated, the only limitation upon the power being that in case of an extension or consolidation no increase in the rate of fare should be allowed.
>
> That is passing ordinances based upon the grant of power referred to, the municipal council of Cleveland was exercising a portion of the

authority of the state, as an agency of the state, cannot in reason be disputed. If, therefore, the ordinances passed after August, 1879, and referred to previously, which ordinances were accepted by the predecessors of the complainant, with whom it is in privity, constituted contracts in respect to the rates of fare to be thereafter charged upon the consolidated and extended lines (affected by the ordinances) as an entirety, it necessarily follows that the ordinances of October, 1898, impaired these contracts.

The question for decision, then, is, Did the consolidated ordinance of February, 1885, and the ordinances thereafter passed and accepted, already referred to, constitute binding contracts in respect to the rates of fare to be thereafter exacted upon the consolidated and extended lines of the complainant?"

The case of Omaha Water Company v. Omaha, 147 Fed. 1, is a leading case on this question. It is cited by Judge Dillon in the text already quoted, as authority for his text. It has been quoted time and again in subsequent cases, both in the United States and Circuit Court cases, and is reported in the leading annotated series of cases. The opinion was written by Judge Sanburn, and concurred in by Justice Hook and Adams. It appears from the opinion that the Legislature of the State of Nebraska empowered the City of Omaha to contract with individuals or corporations for the con-

struction and maintenance of water works "on such terms and **under such regulations as may be agreed upon.** The city, by ordinance, offered a contract for the construction of the work, and their operation for a term of years to the lowest bidder, on consideration that he will first accept the terms of the ordinance, which ordinance provided that the contractors shall furnish water to private consumers during the term at such prices as the contractor and the consumers shall agree upon, not exceeding certain specified and fixed rates. The contractor accepted the ordinance and his assigns constructed the water works and operated them for a number of years. It was held by the court that the accepted ordinance was a contract, and when the city water board sought to reduce the water rates below those specified in the ordinance that the Water Company was entitled to an injunction restraining the enforcement of the city's order lowering the rates, for the subsequent order lowering the rates impaired the obligation of the previous contract. After reviewing all the decisions, and the Illinois decisions referred to by Judge Dillon, Judge Sanborn says:

> "Did the legislature of Nebraska empower the city of Omaha to agree upon unalterable water rates during the term of the contract in hand? Did the city agree that it would not reduce these rates below those specified in the ordinance? We turn back to the act of 1879 and to the ordinance contract of 1880 in the light of the rules and decisions to which we

have adverted, for the answers to these questions. Authority had already been granted to the city to build its waterworks and to regulate the use of water derived therefrom when the Act of 1879 was passed, but no waterworks had been constructed. The state then granted to the city the additional power to contract with third parties "13 for their construction and operation "on such terms and under such regulations as may be agreed on." Are the rates under which water is to be furnished to private consumers "terms and regulations" upon which parties may agree that waterworks may be constructed and operated? The Supreme Court was of the opinion that they were, for it held in the Cleveland case that a city was empowered to agree with a railway company upon rates of fares for passengers under legislative authority to fix the "terms and conditions" for the consolidation of corporation. The city of Omaha evidently thought so, for by the ordinance of 1880 it made specified water rates one of the terms and regulations of the contract which it offered to the lowest bidder and which it required him to accept. The main purpose of city waterworks is the revenue derived from private consumers of water. The rates which they pay absolutely determine the financial success or failure of a city water company's enterprise. The term or regulation in a contract for the

construction and operation of waterworks which more than any other conditions the nature and the prospect of the undertaking is that which fixes the rates which the owner may collect of private consumers. These are matters of common knowledge. The members of the legislature could not have been ignorant of them when they granted to this city the power to agree upon terms and regulations upon which the works should be built and operated, and it is incredible that they intended to except from this general grant the authority to agree upon the cardinal terms which alone conditions the success of the entire undertaking.

Did the city make such a contract? The stipulation concerning these rates is not embodied in the agreement for hydrant rentals which followed the ordinance of 1880. But the city required the contractor, as a qualification to receive the contract, to accept the terms and conditions of the ordinance, and an accepted ordinance is a contract. The ordinance was an offer by the city of the terms and regulations under which it would enter into a contract for the construction and operation of the waterworks. The city prepared and passed the ordinance. All its terms and words were the language of the city. It was enacted under a statute which empowered the city to agree upon the water rates. It prescribed

specific rates for the use of water by private consumers and provided that the water company should furnish water to them at such rates as should be agreed upon between the water company and the consumer not exceeding those specified in the ordinance. The concession is readily made that the acceptance of this ordinance constituted a contract by the water company to furnish the water to private consumers at prices not exceeding those named in the ordinance. The contention is that it left the city free to reduce them. If so, the contract permitted the city to retain the power to withdraw from the water company all the substantial benefits of its undertaking, for a reduction of the rates to private consumers would diminish the most substantial part of its revenue and might ruin the company. It cannot be that either the city or Locke intended to make an agreement of this nature, for such a transaction would be contrary to the ordinary course of action of rational men under similar circumstances. The chief object of the city in the procurement of this contract was a supply of water. The great desideratum of the contractor was remunerative rates from private consumers. The presumption is that the contract secured both, for both parties consented to it. Nor is it doubtful that this was its effect when its terms are fairly read. Concerning the meter rates, which are the subject of this suit, it stipulates:

"Rents for all purposes not herein named will be fixed by meter measurements as may be agreed upon between the consumer and water company not exceeding meter rates."

Here is a plain contract by the water company that it will agree with consumers upon rates not exceeding those specified in the ordinance, and as clear an agreement by the city that the water company and the consumer shall be free to agree upon any such rates which do not exceed those there named. The covenant of the city was that the water company should be free during the term of the agreement to contract with its consumers for any rate not exceeding those specified. Any reduction of those rates, any inhibition of agreements between the company and its consumers upon any rates not exceeding those there specified, necessarily deprives the company of that freedom to contract with its consumers and to collect from them, which the city covenanted by this clause of the contract that it should enjoy. Any reduction of these rates necessarily impairs the obligation of this contract because it deprives the water company of the full benefit of the term of the contract which was most important and beneficial to it. The order of the water board which purported to reduce the rates was made pursuant to a law of the state, and it was therefore violative of

section 10, article 1, of the constitution, and the bill states a good cause of action for an injunction to prevent its execution."

Under a charter provision, as follows:

> "The mayor and aldermen of the city of Bessemer shall have full and ample power, jurisdiction and authority * * to make, erect and repair public wells, cisterns, and establish fire plugs and hydrants, and to make all needful provisions by contract, ownership of waterworks, or otherwise, for the supply of the city and citizens thereof with water."

It was held by the Supreme Court of the State of Alabama, in the case of Bessemer v. Water Works, 152 Ala. 391, et seq., that the city had the authority to contract for rates at which water should be supplied its citizens for a definite period, and of consequence to suspend its charter power in respect to the regulation of rates during such fixed periods. The principles announced were not different than those heretofore announced. The case is cited by Dillon in his note to the text already quoted as authority.

In a more recent case, decided by the United States District Court for the District of Alabama, where the rates had been fixed by franchise contract under a similar charter provision, though its terms were not quite as broad, that the city had the power to enter into a contract fixing during the life of a franchise the rates

to be charged by water companies for furnishing the inhabitants of the town with water. The city in this case attempted to lower the rates fixed in the franchise contract, and it was held in an ably considered opinion, after reviewing all the authorities, that the rates having been absolutely fixed under ample charter provisions that the city could not change the rates during the life of the contract. The case referred to is Birmingham Water Works Company v. Birmingham, 211 Fed. 497.

A more recent case of Wichita Water Company v. City of Wichita, 234 Fed. 415, construes a general law of the State of Kansas (General Laws 1889, Section 7185) which authorizes cities of the first, second and third classes to contract for and procure water works to be constructed for the purpose of supplying the inhabitants of the city with water for domestic use, the extinguishment of fire and other purposes, to the effect that a city was authorized to contract for water rates for private consumers during the life of the franchise, which it could not subsequently reduce before the expiration of the franchise contract, and a subsequent reduction of the rates by the city acting under a subsequent statute authorizing cities to fix rates would work an impairment of the obligation of the water company's contract. Other cases to the same effect are to be found in our points and authorities, and in particular see the recent Washington decision reported in 172 Pac. 890, construing identical provisions.

It must be borne in mind, as said by Justice Moody

in the Home Telephone Company case, "No case, unless it is identical in fact, may serve as a controlling precedent for another." The Illinois cases were decided more upon the interpretation placed by the Supreme Court of Illinois upon charter provisions and general laws of that state than upon the question as one calling for first decision.

As Justice Holmes observes in Water Company v. Tampa, 199 U. S. 242, the Federal Courts will lien towards an agreement of views with the State court if the question seems to them balanced with doubt. In this case there was a change made in rates which it was claimed impaired the obligation of contract, and the prevailing opinion followed the decision of the State court on the question, but the Constitution of Florida contained the provision giving the legislature a continuing power to regulate rates which our constitution does not contain.

It will be noticed that all of the foregoing cases, except the Belfast Water Company case, were cases where the controversy was between the Public Utility rendering services and the State, acting by virtue of its police powers in regulating rates, and it was claimed on behalf of the Public Utility corporation that a change of rates fixed by a franchise contract constituted an impairment of the obligation of a contract, which violated the Constitutional provisions prohibiting the State from passing any law impairing the obligation of a contract. In many of these cases cited, it is seen that the United States Courts have held that these franchise contracts,

where the delegation of a soverign power to regulate rates was sufficient to authorize the fixing of rates could not subsequently be changed or modified without violating the Federal inhibition, so far as the contract of the Public Utility Corporation was concerned.

The foregoing precedents establish the proposition that the city was granted the requisite authority to fix during the life of the franchise the rates it should pay for the service rendered by the water company.

But when confronted with these cases council argues that the provisions of the Federal Constitution, prohibiting the impairment of contracts, does not apply to the contract of a municipal corporation, that the municipal corporation being the mere agent of the State stands in its governmental or public character in no contract relation with its sovereign State, at whose pleasure its charter may be amended, changed or revoked, without the impairment of any constitutional obligation against the impairment of its contracts, and cites the case of New Orleans v. Water Works, 142 U. S. 79-91 as an authority in point.

While the facts in the New Orleans case are quite complicated, and the case was decided rather upon the doctrine of estoppel than upon the question as to whether or not subsequent legislation enacted by the Legislature impaired the contract with the City of New Orleans with the Water Company for furnishing of water, for the court says:

"It does not now lie in the mouth of its coun-

> sel to claim that the obligation of such contract was impaired by subsequent legislation when such legislation was rendered necessary by, or at least was the natural outgrowth of its own repudiation of the contract."

The doctrine announced in the New Orleans case, i. e. that the city being the creature of the State, does not stand in the position to claim the benefits of the Constitutional provision in question, was only a reaffirmance of the principles and distinctions announced in the celebrated Dartmouth College case, 4 Wheaton 518-560-561, and the equally celebrated case of City of Hartford v. Hartford Bridge Company, 10 How. 511-533-534. The distinction was also noted in Fletcher v. Peck, 6 Cranch. 137. The principle has been repeatedly applied since the decision in the New Orleans Water Company case by the United States Supreme Court, and by many of the State Courts.

A more recent case reaffirming the principles which plaintiff in error cited below is City of Worcester v. Worcester R. Co., 196 U. S. 537, as well as in Houck v. Drainage District, 239 U. S. 267.

In all these cases it was contended that the soverign had no right to impair or destroy the contracts made by a municipal corporation, and when retroactive legislation was passed by the Supreme Legislature there was an impairment of the obligation of a contract, and the Supreme Court of the United States held that the Federal provision did not apply to the agencies of a

State; but all of these decisions recognize the principle that a city's proprietory property rights and contracts cannot be diverted by the Legislature, without the impairment of the city's contract in violation of Federal guarantees.

But, assuming that the city's contract in question was subject to modification, or abrogation, as has taken place in this case, under the principles announced in the New Orleans Water Company Case, yet the city's contract under the Constitution of the State of Oregon, as it existed when the contract was entered into, is subject to federal protection, because at the time the contract was entered into between the City and the Water Company, it was provided by the Constitution, making provision for the creation of municipal corporations, that "All laws passed pursuant to this section may be altered or repealed, but not so as to impair or destroy any vested corporate rights."

As we view this provision the framers of the Constitution had in mind to place the city's rights and contracts upon the same plane or grant that a private corporation's rights were placed, or those of a private person. It must not be lost sight of that in each of the earlier cases, where the principle was announced, the Federal Supreme Court expressly limited its decision to cases where there was an absence of Constitutional restriction upon the Legislature from making a modification or change. Here the very restriction noted in these several cases is provided for. The principle is also noted in subsequent cases.

The Hartford Bridge Company case 10 How. 511-533, was one of the celebrated cases of its day, and received extensive discussion both by the people and the profession as to the application of the Federal provisions. It was decided by the Supreme Court of the United States in the December term of the Supreme Court in the year 1850, just a few years prior to the framing and adoption of the Constitution of this State.

Is it not reasonable to believe that men like Judge Deady, Prim, Logan, Boise, and Grover, who sat in the Constitutional Convention, had in mind in framing the Constitution of Oregon to prevent just such a contingency as developed in the Hartford Bridge Company case by the adoption of the provision quoted. There is no reason in principle why a city's contract should not be just as much within the protection of the Federal guarantee as those of a private corporation, if not more so, It certainly has been the subsequent policy of the State of Oregon to completely deprive the Legislature of the State, by the adoption of the Home Rule amendments, of the power to intermeddle with the exercise of municipal powers by cities and towns, and it has been difficult for the State Supreme Court to reconcile the provisions of the State Constitution with existing principles of municipal law, relative to the relation between the State and the municipality, and the power of the State to enact laws, as will be shown by the extreme decision in the case of Rose v. City of Portland, cited by counsel.

The Supreme Court of the State of Oregon has uni-

formily held that the right of municipalities to legislate on municipal affairs is exclusive since the adoption of the Home Rule Amendments: Kalick v. Knapp 73 Or. 558 holding that the legislature cannot constitutionally enact a general law regulating the speed of vehiciles in cities and towns..

Branch v. Albee 71 Or. 188, holding that general act passed by the Legislature providing pensions for policemen was void as a legislature enterference with municipal affairs.

It is also held that Section 2 of Article 11 quoted do not apply to a municipal corporation already chartered, and which under existing laws was entitled to exercise enumerated privileges. Grants Pass v. Public Service Corporation, 87 Or. 637.

We only cite the adoption of the Home Rule Amendments for the purpose of illustrating the limitations which have always been placed upon the legislative powers over municipal corporations in this State, and to show that the charters of existing cities continued in force by virtue of the Amendment. They have always been more circumscribed than they have been in other states. We have expended considerable time in examining into the constitutional provisions of other states, in relation to the creation and organization of municipalities, with a view of discovering whether or not the constitutional provisions of other states contain a like or similar provision to the one found in our state, prohibiting the impairment or destruction of

vested corporate rights. We have gone through the conventional manual of the 6 N. Y. State Constitutional Convention, 1894, which contains a copy of all of the constitutional provisions of the several states existing at that time. We have been unable to find any provision on which is at all similar to the constitution of our state. Practically every constitution provides that all laws in reference to municipal corporations and private corporations may be altered or amended or repealed, but the Constitution of the United States stepped in with a saving clause to these Constitutional provisions as to the enactment of laws impairing the vested rights of private corporations, but it was held that the provision did not apply to municipal corporations, and this suggests that it may be contended by counsel that this provision only relates to private corporations, and not to municipal corporations, but the language of the section will not bear such a construction, because if it intended to confine the operation of this provision to private corporations it would have said so. The words are that "all laws" passed pursuant to this section," etc. Furthermore, there was no necessity of incorporating this provision in this section of the constitution for the protection of the vested rights of private corporations, because the vested rights of private corporations were already protected by the provisions of the Federal Constitution, as have been construed by the United States Supreme Court, as well as by Section 21 of Article I of the State Constitution, prohibiting the impairment of the obligation of contracts and the passage of ex post facto laws.

Judge Sanborn, in the opinion of the Omaha Water Company case, points this distinction out in reference to the Water Company's vested rights.

> "The counsel for the municipality argue that the city was without power to make any irrevocable and unalterable contract regarding rates."

"Because the Constitution provides:

> "No corporation shall be created by special law, nor its charter extended, changed or amended". All general laws passed pursuant to this section may be altered from time to time, or repealed, etc."

In covering the subject the eminent Judge said:

> "Nor does the section of the constitution which provides that general laws affecting the charters of corporations may be altered or repealed condition the validity of the effect of this contract. That section is in pari materia with section 16, Article I, of the same constitution, which prohibits the legislature from passing any law impairing the obligation of contracts, and upon familiar principles the two provisions must be read and construed together. So read they provide that the legislature may make an alteration or repeal of any general law involving the charters of corporations, which does not impair the obligation of

any contract, and that it may make no repeal or alteration of those laws which has that effect."

And this was a principle well understood before Judge Sanborn had occasion to construe the particular constitutional provision in question in the Nebraska case. Hence, there is no reason for the provision, except in order to place the vested rights of a municipality upon the same footing as those of a private corporation, and to take the case out of the operation of the rules that were announced in the Hartford Bridge Company case, so that when a franchise was granted to a city, it would be protected from further tinkering and intermeddling with by members of the legislature who may be actuated by motives that were not for the public interest. It was considered, undoubtedly by the framers of the Constitution that if a city was granted a right to maintain or operate a ferry, as in the Hartford Bridge Company case, or that it had secured certain rights and privileges under prior grants from the legislature, that these rights and grants should be just as much within the protection of Federal guarantees as the organization and property rights of the Dartmouth College, which the legislature attempted to abrogate, and change, and it was held by Chief Justice Marshall and Justice Storey that there was a distinction between the property rights of a charitable and eleomosynary institution, and those of a public municipal corporation, although in subsequent decisions of the Supreme Court of the United States it was pointed out that under

certain chartered cities of earlier times the powers that were granted these corporations were not subject to change or modification by the power of King who granted them, but it was said that this principle was not carried into American jurisprudence, and that the relation between the State and its municipalities was somewhat different. As we have before said, the earllier cases limited the operation of the rule that municipal corporations were not within the protection of the impairment of the obligation of a contract, in cases where there was no constitutional provision restricting or limiting the power of the Legislature to enact laws which would alter, amend or repeal the powers conferred by previous acts of the Legislature. At the expense of being tedious we will take the liberty of quoting a few of the citations from the text.

In the Hartford Bridge Company case, 10 How. 511-33-34, it appears that the City of Hartford was the owner of a ferry franchise, and had been such owner for more than a century. In 1808 a company was organized to build a bridge across the river, which was subsequently completed. In 1818, the Legislature passed an Act which provided for the discontinuance of the ferry. The City of Hartford claim that this law discontinuing the ferry impaired the obligation of its contract. On page 533 the court, speaking through Justice Woodbury, said:

> "But it is not found necessary for us to decide finally on this first and more doubtful question, as our opinion is clearly in favor of

the defendant in error on the other question; vis., that the parties to this grant did not by their charter stand in the attitude towards each other of making a contract by it, much as is contemplated in the Constitution, and as could not be modified by subsequent legislation. The legislature was acting * * here on the one part (*534), and public municpal and political corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river From this standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the legislature as to this ferry must be considered rather as public laws than as contracts. They related to public interests. They changed as those interests demanded. The grantees, likewise, the towns being mere organizations for public purposes, were liable to have their public powers, rights, and duties modified or abolished at any moment by the legislature.

They are incorporated for public, and not private objects, They are allowed to hold privileges or property only for public purposes. The members are not shareholders, nor joint partners in any corporate estate, which they can sell or devise to others, or which can be attached and levied on for their debts.

Hence, generally, the doings between them and the legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions just named, and therefore to be considered as not violated by subsequent legislative changes.

It is hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative sovereignty, and checking most legislative improvements and amendments, as well as supervision over its subordinate public bodies.

Thus, to go a little into details, one of the highest attributes and duties of a legislature is to regulate public matters with all public bodies, no less than the community, from time to time, in the manner which the public welfare may appear to demand.

It can neither devolve these duties permanently on other public bodies, nor permanently suspend or abandon them itself, without being usually regarded as unfaithful, and, indeed, attempting what is wholly beyond its constitutional competency.

It is bound, also, to continue to regulate such public matters and bodies, as much as to organize them at first. **Where not restrained by some constitutional provision, this power is inherent in its nature, design and attitude: and the community possess as**

deep and permanent an interest in such power remaining in and being exercised by the legislature, when the public progress and welfare demand it, as individuals or corporations can, in any instance possess in restraining it."

In Mt. Pleasant v. Beckwith, 100 U. S. 514, the controversy arose over the extinguishment of corporate existence calling for a decision as to the rights of creditors. The court recognized the rule announced in the Hartford Bridge Company case, as well as the holding in the Dartmouth College case. It was held that where no constitutional restriction is imposed the corporate existence and powers of counties, cities and towns are subject to the legislative control of the State creating them. This limitation or distinction was likewise recognized in the case of City of Worcester v. Worcester R. Co., 196 U. S. 539.

From these decisions it is clear that constitutional restrictions can be imposed upon the powers of the legislature, so they may not effect or modify the powers, contracts and incorporeal hereditaments of a municipal corporation, and as we have before observed the framers of the Constitution, undoubtedly, intended to protect the vested or corporate rights of municipal corporations, and the subsequent adoption of the Home Rule Amendments have taken away from the legislature the power to enact any legislation affecting charter power. Further citation of text and authorities are found in our points and authorities.

THE PUBLIC UTILITY ACT DOES NOT PROHIBIT PREFERENCES OR DISCRIMINATORY RATES IN FAVOR OF A MUNICIPALITY.

There are other reasons why the order of the Public Utility Commission, requiring the city to pay the Water Company a rate in excess of the amount fixed in the franchise contract, as before indicated, is in excess of its jurisdiction, and therefore void, and is not binding upon the city, besides the question of the right of the State to impair or abrogate the franchise contract between the city and the Water Company. In fact it is not necessary to the decision of this case to determine whether the State can impair the city's contract, or abrogate its terms. This is because there is no provision in the Public Utility Act which prohibits the city from making a franchise contract which creates an undue preference, or discriminatory rate, in favor of the municipality. The undue preference and unjust and unreasonable discriminations which the act affects, and is directed to prohibit, are those preferences and unjust discriminations which Public Utility Companies made or may attempt to make as between private consumers by charging, receiving or collecting from one consumer a greater or less compensation for any service rendered than it charges, collects, demands or receives from any other consumer for a like and contemporaneous service, under substantially similar circumstances. There is not even a sentence or clause in the act which will bear the construction that contracts between a municipality, in relation to its franchise contracts for the price it

pays for its own private service, can be regulated or abrogated by the powers conferred on the Public Utility Commission, and while we believe that the act can only be construed as having a prospective operation on future contracts made by municipalities in this respect, in so far as the right of a municipality is concerned to demand or receive a free service, or a service at reduced rates, as a consideration for granting the use of the streets to a public service corporation to lay its pipes or mains, in cases where the municipality is invested with power to contract for a public utility, and possibly where the power is not conferred by express legislative delegated authority, yet, whatever may be the proper construction as to whether the act is prospective or retroactive on past contracts, in either event, the Public Utility Act expressly recognizes the right of the Federal Government, **the state and its municipal sub=divisions, to accept, receive, demand any given service from a public utility company, a free service, or a service at reduced rates.** In other words, the latter portion of Sec .63 of the Act, found on page 502, expressly recognizes the common law principle that discriminations by corporations rendering a service affected with a public interest are not opposed to public policy, and are, therefore, not inhibited at common law, as was said in a case where it was claimed a free service contracted for by a municipality prior to the enactment of a Public Utility Act was unlawfully discriminatory, and the franchise contract for free service was abrogated by the enactment of the Public Utility Act. "In the absence of legislation upon the

subject, such discriminations cannot be held illegal as a matter of law, without overturning the foundation upon which the rule was built." And in that State the public law contained no provision sanctioning free or reduced rates in favor of a municipality.

The only section in our Act under which there is the least color of contention that the Commission would have power to change or modify the terms of a franchise contract, providing the terms and conditions upon which the public utility may occupy the streets, or fix a rate or tariff for any given service, is by virtue of Section 61 of the Act, found on page 500 of the 1911 Laws.

This section deals with regulations of a public utility made by a municipality in contracting with a public utility corporation for a public service, and declares that such contract, ordinance or determination shall be **in force** and prima facie reasonable until a complaint is made to the Public Service Commission by a qualified complainant, and the Commission shall then have power to review the contract or regulations, and if it finds the municipal contract or regulation unreasonable, the contract is abrogated, and the finding of the Commission is substituted in lieu of the municipal contract or regulation.

This section is nothing more than a legislative declaration of the principle that a franchise contract, or a municipal regulation, between public service corporation and the municipality fixing rates for private con-

sumers that the State could by virtue of its paramount sovereign authority change the regulation or rate charged private consumers by the Public Service Corporation. This right, as we have seen, only exists in cases where the State has not divested itself of the rate making power, and where it has done so a change of rates for private consumers, other than those fixed by the franchise contract, cannot be made without an impairment of the Public Service Corporation's contract inhibited by Federal guarantees, and under the peculiar provision of the Oregon Constitution, prior to amendment, the municipality's contract as well—or as Judge Harris says in Woodburn v. Public Service Commission, 82 Or. 127:

"When Woodburn granted the franchise to the Telephone Company, the city exercised its municipal right to contract, and it may be assumed that the franchise was valid and binding upon both parties until such time as the State chose to speak; but the city entered into the contract subject to the reserved right of the State to employ its public power and compel a change of rates, and when the State did speak, the municipal power gave way to the sovereign power of the State", citing many authorities.

There is nothing to be found in the section which purports to invest the Public Service Commission with power to change any preferential or discriminatory rate in favor of a municipality. It merely makes that clearer which was already clear before; and removes beyond the pale of doubt, the right of the State, through its dele-

gated commission, to regulate and fix rates by virtue of its sovereign power, in cases where its agency are put in operation by appropriate procedure, and at the same time confirming a municipality's inherent right to contract subject to the reserve power of the State to supervise performance of the contract in the interest of the public.

The authorities are all agreed upon the principle that a free service or reduced rates in favor of the State or municipality is not an unjust or unreasonable discrimination, and opposed to public policy at common law, and in the absence of legislation upon the subject such preferences and discriminations cannot be held illegal as a matter of law. We will quote from a few of the texts and reported cases bearing on this principle. Pond in his work on public utilities, in section 223, chapter XIII, under title "No Discrimination in Service", says:

> "Discrimination in favor of public or charity. A discrimination in rates by way of a reduction for the services rendered for public purposes as well as services rendered charitable institutions in the absence of a statute expresly prohibiting such concessions has been sustained by a number of our courts. Indeed it is not uncommon to provide for free water service for use of the public in connection with the fire department, the parts and similar uses which is treated simply as a part of the consideration for the franchise privileges granted

by the municipality receiving such service."

Wyman in his work on public service corporations, Section 1304, is to the same effect. See excerpt from text found on page .... of the brief.

And more recent cases than those cited in the text of these well known authors are in accord with the statement to be found in the text. A recent authority is the case of Belfast (City of) v. Belfast Water Company,— Me——, 98 Atl. Rep. 738. It appears from an examination of this case that a franchise contract was entered into between the city of Belfast and a Water Company, which, among other provisions, provided that the city should pay a gross sum for water service for its own use for a period of 20 years, and thereafter during the life of the franchise, the city should be extended service free of charge. This franchise contract was entered into prior to the enactment of the Public Utility act in the year 1913. (Session Law 1913, Chapter 129). After the Public Utility Act become effective the Water Company served notice on the city that it would not perform the portion of the contract providing for free service to the city for the reason that under the Public Utility law the company was required to serve all alike. without discrimination, and therefore, the contract was illegal, and unless the city made arrangements to pay a compensation for the service, it would cease to maintain the hydrants or permit their use by the city. The city brought a bill to enjoin the breach of the contract in respect to the provision indicated. The court held:

1. That the provisions of the Public Utility Act forbidding unreasonable preferences did not apply to franchise contracts between the city and water company, for the reason that at common law free service to a municipality was not unlawfully discriminatory.

2. That there was nothing in the Public Utility Act which indicated that the legislation was to have a retroactive effect. But the act indicated that it was to have a prospective operation, which we will discuss later on in this brief.

The court said:

> "Another answer is that free service to the public is not at common law unreasonable, and therefore, unlawfully discrimnatory. The law against unreasonable discrimination rests on public policy. It is forbidden because it is opposed to the interests of the public, which requires that all should be treated alike under like circumstances. Discriminations, however, in favor of the public are not opposed to public policy, because they relieve the people generally of part of their burdens. In the absense of legislation upon the subject such discriminations cannot be held illegal as a matter of law, without overturning the foundation upon which the rule itself is built. New York Tel. Co. v. Siegel Cooper Co., 202 N. Y. 511, 96 N. E. 109, 36 L. R. A. (N. S.) 560. So in Superior v. Telephone Co., 141 Wis. 363, 122 N. W. 1023, a contract binding a tel-

> ephone company to maintain without charge, telephones in public offices of the city, was held not to be invalid as against public policy. (The court quoted from the Wisconsin case and cited a number of authorities). This states the case at common law. If it be said that the common law rule has been abrogated by statute, and that the state under its reserved power may enact regulatory provisions which in effect abrogate the contract, it may be answered that the state has not attempted to do so in this case, except as it may be urged by the public utility statute. Section 31 of that statute prohibits unreasonable preferences. But, as we have seen, discrimination in favor of a municipal corporation is not unreasonable."

The Wisconsin case cited by the Maine Court arose over the contention that a free service extended to the city of Superior was an unjust discrimination as between patrons of the company, and, therefore, invalid.

The case of New York Telephone Company v. Siegel Cooper Company, 202 N. Y. 502, 96 N. E. 109, is a decision of the highest court of that State, concurred in by all Justices. It was claimed that a special reduction of rates provided for in the franchise contract between the Telephone Company and the city of New York was an unjust discrimination as against other patrons. The reduction in favor of the city was twenty-five per cent less than the amount charged other patrons of the

Telephone Company. The court held that such a discrimination was legal, inasmuch as there was no express provision of law inhibiting a preference in favor of the state, and its municipal sub-divisions. The decision is a leading one, and is reported in the select series of cases.

The right of the city to accept free or reduced rates or preferential rates is expressly provided for and confirmed by the provisions of the Oregon Public Utility Act, Section 63 of the Act (Session Laws 1911 page 502) enacts:

> * * * * **"Nothing herein shall prevent the transportation of persons or property or the production, transmission, delivery or furnishing of heat, light, water or power, or the conveying of telegraph or telephone messages within this State free or at reduced rates for the United States the State, or any municipality thereof,** or for charitable purposes, or to employees of any such public utility for their own exclusive use and benefit, nor prevent any such public utility from giving free transportation or service, or reduced rates therefor, to its officers, etc.

This provision is found in the latter part of Section 63 of the Public Utility Act, and is enacted by way of an exception to the first part of the act, inhibiting unjust discriminations. It is obvious, therefore, that the un-

just discriminations referred to in the Act are discriminations between patrons and consumers of the Public Service Company, but not discriminations or preferences in favor of a municipality. Sections 65, 66 and 72, prohibiting undue preferences, rebates, concessions, unreasonable rates, practices and services, not specially designated, etc., bear the same construction. That portion of Section 63 quoted is an express recognition and declaration of the common law principle which did not inhibit discrimination in favor of the public. We believe that it would require an express enactment or provision of the Public Utility Act to give the Public Service Commission of Oregon power and jurisdiction to modify or change a rate or tariff for a public service fixed by a municipality as one of the terms and conditions of its franchise contract between itself as grantor and the public service corporation as grantee. If the act made no provision upon the subject, the right of a municipality to accept and receive a preferential rate or tariff would remain, notwithstanding provisions of the law prohibiting undue preferences and unjust discriminations, and when we take into consideration that there is not an inkling in the title of the Act providing, or purporting to modify the common law rule as stated, or an express provision found in the body of the act inhibiting a preferred rate for the city, and at the same time there is found in the act a provision recognizing the right of the city to accept and receive a preferential rate for service extended itself, it would seem that it was clear beyond doubt that the Commission had exceeded its powers in attempting to modify or change the franchise contract rate to a higher rate than fixed

upon the execution of the contract between the defendant city and plaintiff's predecessors.

It is a familiar rule of law that the sovereign is not bound by the words of a statute, unless it is expressly named, and this rule applies to its agencies, such as counties and municipalities. In that portion of the Act defining discriminations the State or municipalities are nowhere named, and hence they are not within the provisions against discrimination, even if the latter portion of the Act did not expressly except out of the operation of this section discriminations in favor of the State or its municipalities.

The Public Utilities Law of Florida,(Section 8), contains provisions against unlawful discrimination in practically the same words as the Oregon statute, in relation to telephone companies..

The Supreme Court construed this Section in a recent case not yet officially reported. The city of Tampa entered into a franchise contract with a telephone company whereby, in consideration of granting the use of the streets to the telephone company for the purpose of maintaining its poles, etc., the city required the telephone company to render free service to certain city offices, and to the county court house, as well as requiring the telephone company to render services to the city for other purposes at a reduced rate, and less than was charged other patrons who were residing in the city of Tampa. The Public Utility Commission of the State made an order requiring the city to pay the

same rates that private patrons paid for the use of the telephones of the company, on the ground that there was an unlawful discrimination within the meaning of the provisions of the Public Utility Statute, already quoted. The free service, and service at reduced rates, not being discontinued, as required by the order of the Public Utilty Commission, the Commission brought a suit against the telephone company to restrain and enjoin the company from furnishing the city with free service, and services at reduced rates, under the terms of its franchise. There was also a provision to be found in the law more or less to the same effect as Section 61, already quoted, defining the power of municipalities in relation to rate regulations.

The case to which we are referring to is State v. Peninsular Telephone Company, 75 Southern Rep. 201, The Supreme Court of the State said, as to the question involved:

> "The question argued is whether under the statute a telephone company may furnish phones to a municipality for the use of its officers free or at a less rate than is charged the general public."

The court held that unless the city was expressly named in the statute prohibiting discriminations the city was exempted from the provisions of the Act. The court said:

> "A city or a county, being a governmental

> as well as a corporate entity, is in its governmental capacity not a "person or corporation" within the meaning and intent of the above provisions of the statute."

and the court goes on to find that the franchise rights were granted to the company as a part of the consideration for the service rendered, and were of value each, etc.

The rule that a general law of a state does not apply to the state itself, or its agencies, has received recognition by the Oregon Supreme Court on several occasions. In the case of Seaton v. Hoyt, 34 Or. 266, decided in 1899, the rule received express recognition.

The Legislature amended a general law relating to the rate of interest, and the question came up as to whether or not warrants issued by Multnomah County should bear interest fixed by the statute prior to the taking effect of the amendment, or should interest be paid in accordance with the rate provided for in the amendatory act. After citing cases from the United States Supreme Court, wherein it was held that the Government was not required to pay interest on its liabilities, the court said:

> "The rule applies as well to a sovereign state as to the national government. Nor is the state within the purview of a general law regulating the rate of interest upon money due or to become due, and this goes upon the ground that a sovereign is not bound by the words of a statute unless it is expressly named:

(Citing authorities) That the county is but the agent of instrumentality of the state, constituted and employed essentially for the promotion of its general government, and, therefore, subject to like rule and restrictions governing its liabilities as the state, there can be no controversy: 1 Dillon, Mun. Corp., Sec. 23. We take it, therefore, that a county is not liable for the payment of interest under the general provisions of the statute regulating the rate upon the demands enumerated in said section 3587 as an individual would be where there is no contract to pay interest."

POWER OF PUBLIC SERVICE COMMISSION LIMITED TO STATUTORITY AUTHORITY

It may not be amiss to call the court's attention to the extent of the power and jurisdiction of the Public Service Commission, under Public Utility Acts. The Public Service Commission are acting by delegated authority in the performance of their duty. Their powers and jurisdiction are not to be taken by implication, but it only has such jurisdiction as given it by statute. As it derives its powers from statute it has no authority, except such as is expressly conferred upon it. As illustrative of the extent of the powers and jurisdiction of a Public Utility Commission we will quote from the opinions of two reported cases.

In Peoples ex rel, Kelly v. Public Service Commission, 171 App. Div. (N. Y.) 910, holding that an elevator operated by a Real Estate Company between a station and certain heights which it formerly owned, and sold, and for which the company charged one cent for fare for passage to persons to whom it had sold property and five cents to others, was not a public service, falling within the scope of the Public Service Commission Act, the court said:

> "The Public Service Commission only has such jurisdiction as is given to it by statute. It cannot assume jurisdiction over common carriers and other appliances, simply because they are quasi public corporations. This

> elevator, or inclined railroad, however it may be styled, is private property devoted somewhat to public use. But it is not enough to give the Public Service Commission jurisdiction, for many public services are concededly not within the jurisdiction of the Commission."

In Public Utilities Commission v. I. C. R. R. Co., 274 Ill. 41, a question arose as to the power and jurisdiction of the Commission to make an order as to the apportionment of costs between two railroad companies in relation to crossings. The distribution of costs was fixed by statute, but the Commission adopted a different rule than prescribed by statute. In holding that the Commission had erred the court said:

> "The Utilities Commission derives its power only from the statute, and has no authority except such as is expressly conferred upon it, and this being so, it is contended that the order of the Commission setting aside the orders of 1891 and 1909, is void for want of authority."

The jurisdiction of Public Utility Commissions being limited to express statutory powers the order of the Commission, increasing the rate the city should pay for its hydrant service, in excess of the rate fixed in the franchise contract, was beyond its jurisdiction and void.

For further authorities bearing on this point see Paragraph 1 under Points and Authorities.

THE DOCTRINE OF WAIVER, RATIFICATION OR ESTOPPEL CANNOT BE APPLIED.

In respect to the question of equitable estoppel or waiver a great deal may be said, and legions of authorities cited and applied. In the first place the amended answer of the City does not present a question which the court can say as a matter of law constitutes a waiver. Referring to the pleadings covering the resolution of the council requesting an adjustment of the City's water rates, it will be seen that the City expressly alleges that the complaint filed with the Public Utility Commission was designed only to effect the rates between the public consumers and the Salem Water Company, and that it never intended to request any modification of the contract rate fixed for the City's own service. This is apparent in Paragraph VI of the amended answer found on page 31 of the transcript.

In Paragraph VII (transcript page 32) of the amended answer the circumstances of the subsequent adoption of the resolution are detailed. It is alleged that subsequent to the filing of the petition for an adjustment of rates, the Public Utility Commission requested the adoption of a resolution embodying the terms set forth in the resolution subsequently filed with the Commission; that the City Attorney and members of the Council were advised that by the terms of the ordinance granting the Salem Water Company its franchise, the

ordinance could not be amended without the consent of the Salem Water Company; that a request was made by the City to the Water Company to consent and agree before the Public Utility Commission that an adjustment of the rates between the City and the Water Company might be made, but the Water Company refused to join in the resolution or take any action in the premises; that the City represented to the Water Company that it subsequently would take steps to amend the ordinance providing for the rates of its own service, and the Water Company refused to join with the City in said proceedings, and that thereafter, for the purpose of securing and ascertaining the amount of a just and reasonable charge, rate, and tariff, and only as advisory, the City adopted the resolution in question so as to enable the City, if it were subsequently able to secure the consent of the Water Company, to amend its ordinance in accordance with the finding of the Public Utility Commission on the question of a fair and just rate to be paid by the City for its own service; that the City did not agree or contract with the Water Company that it would be bound to agree to any rate fixed by the City in the ordinance under consideration. In other words, the adoption of the resolution was conditional upon the action of the Water Company in joining in with the request embodied in the resolution, and failing in this, the City, for the purpose of ascertaining what would be a reasonable charge to pay for the service of its own hydrants, filed the resolution with the Public Utility Commission. The resolution, therefore, was only advisory, and for the purpose of

securing information as to what would be a reasonable rate for it to pay.

A resolution has never arisen to the dignity of an ordinance or a law, furthermore, the charter of the defendant City directs the method of enacting legislation, and provides that the method should be by ordinance, which shall be read three times and approved by the Mayor before it becomes operative. On page 42 of the transcript the charter method of legislating are to be found. There is no question but any change made in the franchises and contracts with the Salem Water Company is municipal legislation, and which the citizens of the City of Salem under the Constitution have a right to participate in; that is, Section 1-A of Article IV of the Constitution of the State of Oregon reserves to the legal voters of every city the power to refer any measure or law that may be enacted by the city government. There can be no waiver, ratification or estoppel of ultra vires acts of the common council of the City of Salem.

The Public Service Commission had no statutory authority to change or modify the terms of the franchise contract in connection with the rate which the city should pay for its services; likewise, the Common Council of the City had no power or jurisdiction to effect a change in Ordinance 207, and amendments without effecting the changes in accordance with charter procedure for enacting legislation, as well as giving the legal voters of the city an opportunity to confirm the legislation by the referendum. Jurisdiction cannot be conferred by

the City on the Public Service Commission by consent in cases where it does not possess statutory jurisdiction, and obviously there can be no waiver where there is no jurisdiction. See Points and Authorities for decisions covering this point.

Now, the District Court, in its opinion has seen fit to say that the City of Salem invited the action of the Commission in modifying the preferential rate. Such was not the case, and it does not take into consideration, the issues made by the pleading or the existing rights of the parties subsequent to the order of the Commission. The rights of the City in the franchise were muddled by the intermeddling of the Public Service Commission. Under the Public Utility Law it had no jurisdiction to adjust any preferential rates in favor of the City or contract rates made with the Water Company. Its jurisdiction extended only to cases involving the rates between private consumers ,and the Public Utility as we have already seen, and how can there be any waiver or equitable estoppel when the Commission's actions in modifying the rate were beyond its jurisdiction and never assented to by the City unless the City took some affirmative action to the disadvantage of the Company, as if, after the order of the Commission had been made, the City had voluntarily consented to the rates adjudicated by the Commission, the doctrine of estoppel, waiver or ratification might apply, but in this case the point is made that the City never recognized the force of the order and refused to pay the increased toll from the date it went into effect and so notified the defendant in error before its

rights to protect itself became final by the force of the Public Utility Act. The New Orleans Water Company case cited by the Court as sustaining this determination is predicated upon clear principles of equitable estoppel, but that doctrine was only applied because the City of New Orleans by its own actions had caused the Water Company to do certain things it otherwise would not have done.

It must not be lost sight of in considering the question of waiver that it was not known whether the Commission would determine that the contract rate fixed in the franchise contract would be increased or decreased by the findings of the Commission when they would be finally entered or promulgated. This uncertainty placed the Water Company in a position to speculate on the outcome of the determination requested to be made by the City, and if it proved unsatisfactory, to subsequently apply to the court for a review of the order if the rate was decreased below the rate fixed in the franchise contract, or if the rate was found to be benificial or advantageous, to stand on the order and recognize its binding force, and possibly, the City would make no objection, and pay the increase toll. Consequently the Water Company refused to join in the resolution or recognize that the Commission had power to make a finding as to the reasonableness of the franchise rate. Subsequently, when the finding of the Commission increased the franchise rate, it was not disposed to dispute the correctness of the Commission's determination, or that its action was beyond the Com-

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mission's jurisdiction. If the finding had been a reduction from the franchise rate the Company was in a favorable position to apply to the Court for a review of the Commission's order under Section 54 of the Public Utility Act, Providing as follows:

> Section 54. Suits to Set Aside Orders, Procedure, Precedence in Hearing, Burden of Proof.—Any public utility or other person, persons or corporation interested or in affected by any order of the Commission fixing any rate or rates, tolls, charges, schedules, classifications, joint rates or rates, or any order fixing and regulations, practices, act or service, being dissatisfied therewith, may commence a suit in the circuit court of the county in which the hearing was held, against the Commission as defendant to vacate and set aside any such order or specified portion thereof on the ground that the order or portion thereof is unlawful, in which suit a copy of the complaint shall be served with the summons as in a suit of equity. The Commission shall serve and file its answer to said complaint within ten days after the service thereof, whereupon said suit shall be at issue and stand ready for trial upon ten day's notice by either party. All suits brought under this section shall have precedence over any civil cause of a different nature pending in said court, and the circuit court shall always be deemed open for the trial thereof, and the same

> shall be tried and determined as a suit in equity Every such suit to set aside, vacate or amend any determination or order of the Commission or to enjoin the enforcement thereof or to prevent in any way such order or determination from becoming effective, shall be commenced, and every appeal to the courts or right or recourse to the courts shall be taken or exercised within ninety days after the entry or rendition of such order or determination, and the right to commence any such action, proceeding or suit, shall terminate absolutely at the end of such ninety days after such entry or rendition thereof.

But this method of review would not be exclusive. The controversy arising would be one over the terms of the franchise between the city and the Water Company and involving questions between the immediate parties to the franchise contract. These rights could be readily determined in an action at law where the right to trial by jury would be available. The principle that the remedy provided by the Public Utilty Act supra, is not exclusive, is recognized by two decisions construing the Public Utility Act. In California, etc. v. City of Grants Pass 203 Fed. 173, which called for a consideration of the question as to whether the adoption of the Public Utility Act supersededed Charter provisions empowering cities to regulate rates, the Court says:

> "The city has not attempted to revoke or

annul the franchise under which the plaintiff is maintaining and operating its plant, but only to fix the rates to be charged by it, and hence the validity of such franchise is not involved in this suit, and the adoption of the ordinance of 1912 is but an effort to repudiate the contract of March 29, 1910. The plaintiff has a full, complete, and adequate remedy in an action at law to recover on the contract, in which the rights of the parties can be determined."

See also Woodburn v. Public Service Commission 82 Or. Page 120.

The parties before the Commission were adverse. The city had no financial interest in the returns made upon the capital invested in Water Company or its earnings. It was attempting to secure the best rates possible for its citizens in the performance of its public functions, and to secure by negotiation, it it was possible, to do so, the cheapest rate it could for its own service, and thereby relieve the tax-payers of the city of their burdens. By filing with the Commission the resolution in question it was securing information by experts in the matters of public utilities, as to whether or not, the rate fixed in the franchise for its own service, was reasonable or just. The city could have appealed to the court for a review of this order, if it did not see fit to abide byit, or it could await the subsequent action to be taken by the Water Company in whatever form it might choose.

Under Section 54 of the Public Utility Act quoted, the parties in a proceeding before the Public Utility Commission have ninety days after the order or determination of the Commission becomes effective as time within which to appeal to the courts for a review of the determination of the Commission. On the first day of October, 1914, (Transcript page 75) the Order of the Commission became effective. The city notified the Water Company that it would not be bound by the order of the Commission changing its franchise rate immediately after it went into effect. The Water Company continued to furnish the city hydrants with water. On the first day of November, 1914 the Water Company presented the city with a statement of account for hydrant service for the month of October, 1914, in the sum of $370.00, see Transcript page 15. This gave the Water Company notice in no unmistakeable terms, that, the city did not recognize the validity of the order of the Public Utility Commission in contoversy. The Water Company on this date, had approximately seventeen days as time within which to apply to the court for a review of the findings of the Commission, and if the court would find that the order of the Commission was beyond its jurisdiction, the proceedings before the Commission, would be, remanded by the court, for amendment so as to readjust the rates to be paid by consumers which would not impair the earning capacity of the Water Company on its investment. It was the duty of the Water Company, when it had notice that the city would not recognize the authority of the Commission to make the change in

question, to review the order of the Commission before it became final in respect to other rates. If it choose to permit the order of the Commission to become final, on all its rates it did so at its peril. The Company had notice that the city would not be bound by the order of the Commission. There was no corresponding duty on the part of the city to review the findings of the Commission. The city had a clear right to adopt the course disclosed by this record, i, e, to notify the Water Company that it would not be bound by the order of the Commission changing its contract rate for service, before the order of the Commission became final, and then set up the defense that the order of the Commisdion was beyond its jurisdiction in an action at law to recover for services by the Water Company.

The doctrine of waiver cannot be applied to the facts in this case, for the reason that the parties were adversaries before the Commission and there is nothing to show that the resolution No. 1294 in anything misled the Water Company, or cause it to do any act to its disadvantage that it otherwise would not have done. The Water Company was not before the Commission by its own choice, but it was heralded there in in irtum, it refused to join in the resolution requested by the Commission, and when the Commission made a finding thereon, which was to its advantage, it has sought to secure the benefit of the advantage, when it knew that the city disavowed the binding force of the order, and refused to protect itself by appealing to the courts for a review of the proceedings. It certainly does not

lie in the mouth of the Water Company to say that these facts call for the application of the doctrine of waiver. By assuming this attitude the Water Company has waived any right it had to complain of the action of the city in filing the resolution. If the city had paid the first installment of the increased rate, the first month that it became effective, there is no question in our minds but what the doctrine of waiver or estoppal or ratification could not be applied, because under such circumstances the action of the city would have misled the Water Company to its disadvantage, and its earnings would have been impaired. But when it saw that its earnings would be impaired by the refusal of the city to recognize its binding force it was its duty to speak out, and proceed to protect itself by review under the Act.

The entire record shows that this resolution was intended to be only as advisory to the city, and to enable it to take such future action in reference to its contract with the Salem Water Company as might see fit to do; obviously if the city was paying a rate that was too high the city would prefer to effect a different arrangement with the grantee of its franchise. It is a well known fact that Public Service Commissions are a state agency designed to protect the public against the unjust exactions and unreasonable rates charged the public by public utilities in the absence of statutory or municipal regulations. These Commissions whatever may be, the construction placed by them on their powers and duties, are public servants and their salaries and expenses are paid out of the

public funds of which the taxpayers of the city pay a large proportionate share. Expert accountants and appraisers are employed by the Commission to investigate the affairs of these corporations, and after making an inventory and appraisment of the investment and value of the corporate properties, to determine the rates to be charged the consumer which will yield a fair return on the investment made. Such being the function of the Commission, the city had a legal and moral right to call on the Commission to determine and furnish information as to what would be the just and reasonabe rate for the city to pay defendant in error for hydrant service. This information would place the city in a position to take such future action with the grantee of its franchise as would serve the best interest of its tax-payers, and this, notwithstanding that the Commission was the father of the resolution as alleged.

Woodburn v. Public Service Commission 82 Or. 114, does not control.

Counsel has cited City of Woodburn v. Pubilc Service Commission 82 Or. 114, below as an authority to the effect that municipal franchise contracts, fixing rates for a given service between a municipality and a pubic service corporation are subject to modification by the Public Service Commission, either increasing or decreasing the rates fixed by the franchise contract, when the State chooses to act in regulating rates upon complaint being made by a qualified complainant, and, hence, the Commission was authorized to modify and

change the fixed rates by the franchise contract between the Water Company and the city, notwithstanding it was entered into prior to the enactment of the Public Utility Act. As we understand counsel's contention, the charter provision of the city was not broad enough to authorize it to fix a rate for itself during the life of the franchise. The right to fix rates during the life of the franchise must be granted by the Legislature in express terms, for the power to fix or regulate rates is a continuing one, and all doubts must be resolved against the city. We do not dispute the correctness of the ruling in that case, though we do contend that there was, under the Salem Charter, a sufficient grant of power to fix rates if the city had undertaken to do so, but passing that question, we fail to find anything in the Woodburn case not in harmony with the views here expressed. The principle announced in that case can have no application to the facts presented in this case. The statement of the principle found in that case that all doubts must be resolved against the city does violence to a controversy as between a grantor and grantee of a public franchise. The case is an authority in our favor, because it clearly limits its decision to the question whether the city of Woodburn, which had adopted a charter under the Home Rule Amendment, could grant a franchise to a telephone company and fix the rates for patrons which the State could not afterwards change. The franchise was granted prior to the taking effect of the Public Utility Act. and under a charter adopted pursuant to the Home Rule enactment. The court clearly points

out the distinction between a controversy, as arises in this case, and the Woodburn decision, in two seperate paragraphs in the opinion. On page 127 the court says:

> "The right of the State to regulate rates by compulsion is a **police power**, and must not be confused with the right of a city to exercise its contractual powers to agree with a public service company uppon the terms of a franc chise."

On page 120, the court says:

> "Throughout the discussion it must be borne in mind that the State, acting through the Public Service Commission, is a party to this suit, and consequently judicial precedents, arising out of controversies between none but the immediate parties to a franchise are not controlling here. Moreover the present juncture does not call for a decision of the relative rights of the grantor and grantee of a franchise as between themselvves. Furthermore, the very purpose of this litigation is to determine whether the state has in fact empowered Woodburn to fix a schedule of rates which the State could not afterwards change, and, hence, we must also distinguish all these judicial utterances which followed a finding that the State has actually conferred upon a city the power to unalterably fix the rates to be charged by the grantee of a franchise."

The court held that the power to fix rates did not appertain to the government of a city, nor was it even incident to a grant of authority to the people of a municipality to enact or amend a charter of a city, and that a city, therefore, enacting a charter under the Home Rule Amendment, could not assume unto itself the soverign powers of the state to regulate rates and fix unalterably the rates to be charged, and thus preclude the State from exercising its sovereign powers. Nothing is said about the right of the city to contract between itself and grantee of a franchise for a free service ior a service at reduced rates, and this is the question arising in this controversy.

From the above reasons it is apparent that the order sustaining the demurerr to the amended answer and order allowing judgement on the pleadings and the final judgement are contrary to the Public Utility Act and the decisions of the courts, and the District Court therefore, made error of law in this respect.

Therefore, it is contended that this case should be reversed.

Respectfully submitted,
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